

EXHIBIT A

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

ELLIOT MCGUCKEN,

Plaintiff,

vs.

Case No.

1:19-cv-09617 (KPF)

NEWSWEEK, LLC,

Defendant.

CONFIDENTIAL DEPOSITION OF ELLIOT MCGUCKEN, Ph.D.

APPEARING REMOTELY FROM

VENICE, CALIFORNIA

March 15, 2021

9:35 a.m.

REPORTED BY:

Sheree L. Spencer

CSR No. 11073

APPEARING REMOTELY FROM LOS ANGELES COUNTY, CALIFORNIA

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Elliot McGucken v. Newsweek, LLC

Monday, March 15, 2021

Sheree L. Spencer, CSR No. 11073

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1 REPORTED REMOTELY FROM LOS ANGELES COUNTY, CALIFORNIA
2 MONDAY, MARCH 15, 2021, 9:35 A.M.

3
4 THE REPORTER: The attorneys participating in
5 this deposition acknowledge that I will be reporting
6 this deposition remotely pursuant to California Code of
7 Civil Procedure Section 2025.310.

8 At this time may I have appearances by counsel
9 for the record, please.

10 MS. ZAHARIA: Laura Zaharia of
11 Doniger/Burroughs for Plaintiff Dr. Elliot McGucken and
12 then Stephen Doniger and then Stephen Doniger from our
13 Venice office is also on.

14 MS. GATES: And for Defendant we have Sara
15 Gates and Nancy Wolff as well.

16 THE REPORTER: Thank you so much.

17 Mr. McGucken, can you please raise your right
18 hand so I can swear you in?

19 Do you solemnly state that the testimony you
20 are about to give in the cause now pending will be the
21 truth, the whole truth, and nothing but the truth, so
22 help you God?

23 THE WITNESS: I do.

24 THE REPORTER: Thank you.

25 You may proceed, Counsel.

1 MS. GATES: Thank you.

2
3 EXAMINATION

4
5 BY MS. GATES:

6 Q. So is it Dr. "McGucken"?

7 A. Yes. Dr. "McGucken," but that's fine.

8 Q. "McGucken."

9 A. Yeah.

10 Q. My apologies. Thank you.

11 A. It's Irish.

12 Q. Understood.

13 Have you been deposed before?

14 A. Yes, I have.

15 Q. How many times?

16 A. Once.

17 Q. Do you recall what the -- what the case was
18 about?

19 A. Yes.

20 Q. Could you provide some information about the
21 purposes of the deposition?

22 MS. ZAHARIA: I'm going to object to the extent
23 that this calls for attorney-client communications.

24 I instruct you to not answer or disclose any
25 attorney-client communications, but if you have some

1 other understanding independent of the conversations
2 with your attorney, you can let Ms. Gates know.

3 (Instruction not to answer)

4 BY MS. GATES:

5 Q. Do you have any other understanding separate
6 from the privileged communications about what the
7 deposition or the case was about?

8 A. It was confidential, but it concerned
9 copyright.

10 Q. So the deposition was for the purposes of a
11 copyright infringement case --

12 A. Yes.

13 Q. -- is that correct?

14 A. Yes.

15 Q. Do you understand today that you have to tell
16 the whole truth, nothing but the truth, and will you do
17 that today?

18 A. Yes.

19 Q. And do you further understanding that the
20 testimony you're giving today is just as important as if
21 you were in a courtroom before a judge and a jury?

22 A. Yes.

23 Q. And throughout today, if you don't understand
24 my question, will you let me know?

25 A. Yes.

1 Q. And if you need me to clarify something, will
2 you ask me to clarify?

3 A. Yes.

4 Q. And if you answer my question, I'm just going
5 to assume that you understood the question. Okay?

6 A. Yes.

7 Q. And is there any reason, medical or otherwise
8 that would prevent you from giving truthful, complete,
9 and accurate testimony today?

10 A. No.

11 Q. And if that ever changes throughout the day,
12 will you let me know?

13 A. Yes.

14 Q. Great.

15 And just touching back about the previous
16 deposition that you were a part of, do you recall the
17 case name?

18 A. McGucken versus theCHIVE.

19 Q. Thank you.

20 You said you're located in California; is that
21 correct?

22 A. Yes.

23 Q. Is there anyone else in the room with you
24 today?

25 A. Yes.

1 Q. Who is in the room with you?

2 A. Mr. Doniger.

3 Q. And is he representing you in a capacity as
4 attorney today?

5 A. He could.

6 Q. Is he or can he?

7 MS. ZAHARIA: Objection. Vague.

8 BY MS. GATES:

9 Q. You can answer.

10 A. I think so.

11 Q. Is he motioning to you from behind the camera?

12 A. Not right now.

13 Q. Can he motion to you -- or is it possible that
14 he could motion to you from behind the camera?

15 A. Yes.

16 MS. GATES: Okay. Mr. Doniger, would it be
17 possible for you to turn on the camera so that we can
18 see you as well as see the witness?

19 MR. DONIGER: So I'm just here to get things
20 started. The camera -- I love being in my office. I
21 plan on being in my office. I'm just here to make sure
22 that everything's working initially, so I don't -- there
23 is no camera in front of me to turn on.

24 MS. GATES: Okay. Would it be possible for you
25 to sit within view of the witness' camera? I mean,

1 we're just concerned here that you could potentially be,
2 you know, holding up a huge sign and coaching the
3 witness.

4 MR. DONIGER: Well, I don't have any huge
5 signs. I don't know what to do. I'll just -- good.
6 I'll be in my office. There's no issues here, guys.
7 Again, not an issue. I was just setting him up. Okay.

8 BY MS. GATES:

9 Q. So if he leaves the room, is there anyone else
10 in the room with you?

11 A. No, not now.

12 Q. Is there anyone in your vicinity that can
13 potentially hear your testimony today?

14 A. No.

15 Q. Is there anything in front of you that is out
16 of view of the camera?

17 A. A cup of coffee and a phone.

18 Q. Is your phone turned on or --

19 A. This is what it looks like now.

20 Q. Could you perhaps place it facedown so you --

21 A. Sure.

22 Q. -- won't see any messages?

23 A. Yeah.

24 Q. Thank you.

25 Are there any other documents or notes in front

1 of you?

2 A. Nope.

3 Q. Great.

4 And what type of device are you using to access
5 this Zoom meeting?

6 A. Asus VivoBook.

7 Q. And aside from your phone, are there any other
8 devices in the room --

9 A. No.

10 Q. -- iPads, other mobile devices?

11 A. No.

12 Q. And is there anything else on your screen?

13 A. No. Just this and e-mails going to it.

14 Q. Okay. Thank you.

15 So without getting into any privileged
16 communication, could you tell me what you did to prepare
17 for this deposition today?

18 A. I had a -- I -- I conferred with my attorney.

19 Q. Did you meet with anyone else?

20 A. No.

21 Q. How many times did you meet with your lawyers?

22 A. Once.

23 Q. Was that an in-person meeting or a virtual
24 meeting?

25 A. Phone.

1 Q. Did you review any documents with your
2 attorneys?

3 A. Yes.

4 Q. Could you briefly characterize what type of
5 documents you reviewed?

6 A. It was the documents that are generally related
7 to this case. There may be about seven or eight of
8 them. Just documents related to this case.

9 Q. Were they documents that had a Bates number on
10 them?

11 A. A what number?

12 Q. A Bates number.

13 A. I believe so. They had some numbers on them.

14 Q. So you reviewed about seven or eight documents
15 in total before today?

16 A. Yes, about. Yeah.

17 Q. Did you do anything else to prepare?

18 A. Not too much. Just generally referred the
19 details of the case.

20 Q. So what is it that you do for a living?

21 A. Photography.

22 Q. What type of photography?

23 A. Landscapes mostly now, but also portraits.

24 Q. Did you go to school for photography?

25 A. No.

1 Q. What did you go to school for?

2 A. Physics.

3 Q. Where did you go to school?

4 A. Princeton University for undergrad and
5 University of North Carolina for graduate school.

6 Q. What degrees did you receive?

7 A. I received a B.A. in Physics, a Master's in
8 Physics, and a Ph.D. in Physics.

9 Q. And do you have any other degrees?

10 A. No.

11 Q. So do you work -- do you work now as a
12 physicist?

13 A. I write books, physics books, books on physics.

14 Q. How many physics books have you written?

15 A. I think I have around five out there with more
16 on the way. Maybe six. I think five.

17 Q. Do you work with other people to write these
18 books?

19 A. Both.

20 MS. ZAHARIA: Objection. Vague.

21 BY MS. GATES:

22 Q. Do you write the books by yourself, or do you
23 have a coauthor?

24 A. Yes, I do write them, but as Isaac Newton said,
25 we stand on the shoulders of giants to see further,

1 so... I mean, physics is very collaborative, but I write
2 them myself.

3 Q. So you don't have any coauthors for any of your
4 physics books?

5 A. I don't believe I do.

6 Q. Aside from writing physics books, do you do any
7 other work in the field?

8 A. The physics field?

9 Q. Correct.

10 A. No. Right now I'm just writing books.

11 Q. Do you teach physics?

12 A. I did, but not at the moment I do not teach.

13 Q. When did you teach physics?

14 A. I taught physics last around 2004/2005 -- or
15 maybe 2006 was the final time I taught physics.

16 Q. And where did you teach at that time?

17 A. I taught physics last at UNC Chapel Hill.

18 Q. And what was the course?

19 A. It would have been Electricity and
20 Magnetism 25, I believe, that's for Pre-Med majors.

21 Q. And aside from previously teaching and writing
22 books on physics, did you -- have you done any other
23 work in the field of physics?

24 A. Yeah. Well, research.

25 Q. Do you still do research in physics?

1 A. Well, for my books.

2 Q. And who publishes these physics books?

3 A. I publish -- they're self-published.

4 Q. So you don't work with a separate publisher?

5 A. No, I don't.

6 Q. Do you receive an advance for any type of
7 prepayment for these books?

8 A. No.

9 Q. So how are you compensated for the physics
10 books?

11 A. Through sales.

12 Q. And are you referring to print sales?

13 A. Well, they're digital books at the moment, so
14 digital sales.

15 Q. "Digital sales"?

16 Do you sell through a specific digital
17 platform?

18 A. Amazon.

19 Q. Do you sell the physics books through any other
20 platform?

21 A. I -- not at the moment, I don't believe so, no.

22 Q. What's the typical cost of one of your physics
23 books?

24 MS. ZAHARIA: Objection. Vague.

25 THE REPORTER: I'm sorry. I didn't hear your

1 objection, Counsel.

2 MS. ZAHARIA: "Objection. Vague."

3 THE REPORTER: Thank you.

4 BY MS. GATES:

5 Q. You can answer if you understand it or I can
6 rephrase.

7 A. They're around \$9.99. I believe that's the
8 most. Some are less expensive. Maybe 4.99 or 5.99, so
9 probably between 4.99 and 5.99.

10 Q. Do you know how many books you've sold?

11 A. I would have to check my records.

12 Q. Could you provide a ballpark estimate of how
13 many books, physics books, you sold?

14 A. I would really -- because it varies month to
15 month. Overall, like a few hundred, but I would have to
16 check.

17 Q. So a few hundred overall time to date?

18 A. Yes. I'd say that's a modest estimate, maybe
19 more.

20 Q. Okay. So these books are -- they're sold only
21 through Amazon?

22 A. At the moment.

23 Q. How do you typically market the books?

24 A. Well, I have different -- I mean, you just
25 share your ideas in different physics forums, and I have

1 a Facebook page where my physics books are -- it's like
2 a Facebook page for physics, so it's people interested
3 on that level. And there's physics groups where you
4 share your ideas. It's not so much a marketing thing as
5 it is sharing ideas, so.

6 Q. So sharing ideas is important in physics?

7 A. Yes.

8 Q. Can you estimate what your monthly income is
9 from the physics books sales?

10 A. Maybe -- right now, I'd have to go and check my
11 records because it varies a lot in book selling. Maybe
12 around a hundred dollars a month is a good month, but
13 sometimes it's a lot less and sometimes it's a bit more,
14 so maybe around 40, \$50.

15 Q. Okay. Let's go back to photography. About how
16 much money do you earn through photography a month?

17 A. Well, that all varies widely from year over
18 year and month over month. So I would have to go back
19 and check records.

20 Q. Could you estimate what would be a good month
21 for photography?

22 A. Maybe around 5-, 6-, 7,000.

23 Q. And could you estimate what would be a bad
24 month for photography?

25 A. Like, a thousand or less, or zero.

1 Q. So would you say that photography is your
2 primary way of making a living?

3 A. Yes.

4 Q. And how do you earn money through photography?

5 A. Licensing.

6 Q. And you said --

7 (Simultaneous colloquy)

8 THE WITNESS: Go ahead.

9 BY MS. GATES:

10 Q. Go ahead.

11 A. Licensing and print sales.

12 Q. When you say "licensing," do you mean exclusive
13 licensing? Nonexclusive licensing?

14 A. Generally exclusive or both, a combination of
15 both.

16 Q. And when you say "licensing," are you referring
17 to a specific medium?

18 A. No. It's been various mediums.

19 Q. Do you typically license more for prints or
20 online?

21 A. Well, it all -- it varies. The -- probably
22 online more than print.

23 Q. Can you estimate how much you make a month for
24 online licensing?

25 A. Well, as I said before, it's in that range. It

1 could be, like, several thousand dollars or not too much
2 at all.

3 Q. So for online licensing, you're referring to
4 that same range of 5-, 6-, \$7,000 in a good month, and
5 then a thousand dollars or less on a bad month; is that
6 correct?

7 A. Yes.

8 Q. So what do you typically charge for an online
9 license?

10 A. It all varies. The ones in this case, I think
11 we have documents of how much it was charged.

12 Q. Okay. And we can get to that. Just trying to
13 get a general sense of your licensing history.

14 Do you -- you know, on the high-end, what would
15 you charge for an online license?

16 A. It all depends on the weeks, and it varies. I
17 don't know if I have a number. It all depends on a
18 case-by-case basis.

19 Q. So what types of usage would you charge a
20 higher license now?

21 A. It all -- it still depends, because sometimes
22 you get paid different ways. So for instance, I think I
23 charged \$250 for the cover of "Nikon Photo Magazine,"
24 but that was also prestigious to be on the cover, so
25 that's payment in itself.

1 Q. So you received a license fee for -- of \$250
2 for an image being on the cover of a magazine; is that
3 correct?

4 A. Yeah, I believe. It's 200, 250. I think it's
5 between -- I would have to check directly, but --
6 because it was through a U.K. company, so it's in pounds
7 also, I think, at one point. So between 200 and 250.

8 Q. And is that a print magazine or an online
9 magazine?

10 A. It's both.

11 Q. So that license, in that instance, was for
12 those prints being online; is that correct?

13 A. Yes.

14 Q. And you also referred to print sales; is that
15 right?

16 A. Yes.

17 Q. So do you mean selling prints of your own
18 photography?

19 A. Yes.

20 Q. And this means the physical prints; correct?

21 A. Yes.

22 Q. So how do you sell prints of your photography?

23 A. Through various people who know people. I was
24 in a gallery up until around 2013 or so until they sold
25 the building, and I had plans to open a gallery, but

1 COVID kind of threw a wrench in the machine. If you're
2 going to sell really, really high-end prints, you need,
3 like, a physical space, so that's kind of what I was
4 shooting for. So, yeah, it -- it ranges.

5 I donated prints to UCLA hospital, they bought
6 prints from me, and there's -- you know, I've sold
7 prints.

8 One of the -- one of the things I'm not --
9 because of COVID, I'm not really concentrating on
10 selling prints at the moment, because it's a much more
11 in-person kind of thing. I mean, meeting people, seeing
12 their faces and setting things up, so.

13 Q. So you referred to a gallery from 2013. What
14 gallery is that?

15 A. Oh, it was in the space -- it was in Westwood,
16 and it was in the Bel Air camera store, and a part of it
17 was a gallery.

18 Q. So was that a gallery dedicated to the sale of
19 your photography or other photographers?

20 A. Different photographers appeared in there, but
21 I was there probably for most of it until they sold the
22 building.

23 Q. And how long were you participating in that
24 gallery?

25 A. Around six months to a year, but then after one

1 of the photographers left, they put some of my works
2 back up. So it's a little bit nebulous, because they
3 were in the process of selling them both, but they
4 wanted a photographer there so.

5 Q. And have you been a part of different galleries
6 other than that one?

7 A. No.

8 Q. So when you were selling through this gallery,
9 what was the -- a typical price of a print sale?

10 A. Maybe around a thousand dollars or so.

11 Q. Was it a limited edition print?

12 A. Yes.

13 Q. Do you often sell limited edition prints?

14 A. No, I don't -- I'm not doing it at the moment,
15 but they're -- I don't sell it directly online, but
16 they're always available if someone calls and asks.

17 Q. Do you also pay for the -- the cost of
18 printing?

19 A. Yes.

20 Q. How much does that typically cost you?

21 A. It varies. I mean, it can be up to a thousand
22 dollars, but generally if I sell a print for a thousand
23 dollars in costs, it may be half, around 500 or so.

24 Q. And when you do limited edition runs, do you
25 select a specific number for the editions?

1 A. Yes, I've worked with different numbers before,
2 but they're -- that's an ongoing debate as to the best
3 approach. Like, Ansel Adams never limited his editions,
4 so -- and plus, printer technology gets better over
5 time, so in the far future you can technically print
6 better prints, so I'm -- I'm little bit still figuring
7 out the best model.

8 Q. So do you have a range for your limited edition
9 run?

10 A. I mean, it depends on the size, it depends on
11 the format, it depends on what kind of printing options
12 they want, so it varies widely.

13 Q. Would you say the range is more than 200?

14 A. Yeah, generally to sell a fine art print it's
15 going to be over \$200.

16 Q. I was referring there to the number of editions
17 if you were --

18 A. Oh, yes. I think I had some that were around
19 200 or so.

20 Q. Would you have a -- an even higher run of
21 500 prints?

22 A. Yes. Yes. It depends on the print being sold.
23 And, again, it's very flexible as to when you can come
24 out and view work, whether you want to do, like, a
25 10 limit or something, or you want to change that number

1 around. So, yeah, it varies.

2 Q. Would you pick the limit, you know, before
3 selling a print?

4 A. Generally, yes.

5 Q. So you'll select, you know, for this specific
6 print, I want a limited edition of, you know, 200 prints
7 to be sold?

8 A. Yeah, generally, yes.

9 Q. So how do you sell prints now if you don't have
10 a gallery?

11 A. Online.

12 Q. And when you say "online," are you referring to
13 a specific platform?

14 A. Yeah. Well, it's powered by SmugMug.

15 Q. What is "SmugMug"?

16 A. It's a photo share and sell site, like they do
17 prints for you. But I haven't been heavily promoting
18 it, because it's not my favorite way of selling prints.

19 Q. Why is it not your favorite way of selling
20 prints?

21 A. Because I'm trying to build, like, a
22 top-of-the-line brand, so you want the very best
23 printers, and you generally want to do it more in
24 person. Like in order to sell high-end prints, you
25 really need that tactile presence. People need to come

1 in and feel and touch and see it, and that's how you can
2 really sell prints. So that's what I'm holding off for.

3 Q. And in order to achieve that, would you need a
4 gallery or a physical location?

5 A. Yes.

6 Q. So you said SmugMug has power in the platform?
7 Is it located on SmugMug's website or your own website?

8 A. No. No, the print is located on the SmugMug
9 servers.

10 Q. Got it.

11 And do they also actually print the physical
12 objects for you?

13 A. Yes.

14 Q. So SmugMug is -- provides -- providing the
15 platform and then also doing the printing --

16 A. Yeah.

17 Q. -- is that correct?

18 A. The printing and the delivery. Yeah.

19 Q. And do you advertise your own prints on your
20 own website?

21 A. I think I have various links on different
22 places that link but, again, it's not something I'm
23 pushing too heavily right now, because my preferred
24 style would be to sell high-end prints in a gallery.

25 Q. So now, you know, during the pandemic, what --

1 what do you typically receive from print sales?

2 A. Not too much because I'm not promoting it too
3 heavily, so, I mean, there's some months where there's
4 no sales whatsoever and then maybe like a hundred
5 dollars here and there. But for the past year, I
6 haven't really been pushing items.

7 Q. Is there anything in particular you've been
8 pushing during the pandemic, if not prints?

9 A. Mostly I've been self-isolating in the wild
10 just honing my craft and building up my -- my base of
11 photography. Recently in the Nature's Best Photography
12 Awards, I placed four in the top 100 out of the 3,000
13 entries, so that's kind of like the 99.9 percent
14 percentile. So my philosophy during COVID, I had looked
15 at some gallery spaces and considered it, but you don't
16 really want to open in a pandemic. So I took a step
17 back and decided I'm just going to focus on building --
18 building the brand, shooting high quality photography,
19 and getting my name out there.

20 Q. So when you say "building the brand," what
21 steps have you taken to do that?

22 A. Well, photography is one of those things where,
23 you know, they -- when the king wanted to learn geometry
24 and he said, "How much do I have to pay you?"

25 And they said, "Well, there's no real road to

1 geometry. You know, you have to study it."

2 So photography there's no real road to
3 marketing. I mean, you can't really buy it so much as
4 the only thing you can do is take better -- better
5 photos and get your name out there and get a claim in
6 different places, so that's really been my philosophy.

7 Q. So the -- the nomination you just referred to,
8 is that for professionals or amateurs?

9 A. It's for both, but you have to specify, and I
10 was in the professionals category. Actually, I don't
11 know if they have an amateurs category, but, yes, it's
12 professional photographers.

13 Q. So have you won any other awards for
14 photography?

15 A. No. I really just started thinking about
16 entering to build my brand pretty recently, so...

17 Q. So it's only recently that you started entering
18 these competitions?

19 A. Yes.

20 Q. Have you received any other recognitions for
21 photography?

22 A. Yeah. Well, I was published in the
23 Smithsonian, the cover of the "Nikon Photo Magazine." I
24 have a huge panorama at Edwards Air Force Base at the
25 commander's office. I think it's, like, 90 feet wide,

1 and I have around over a hundred prints throughout the
2 UCLA hospital system. So all of these are awards --
3 awards and rewards. And, you know, when you work with
4 somebody like the art curator at UCLA who's been in the
5 business for, like, 40 years, that's a reward in itself
6 that she likes your work, and that means a lot and
7 carries a lot because she's seen a lot. So there's tons
8 of smaller awards like that, so...

9 Q. So of those uses that you were just referring
10 to, is that for a particular image or groups of images?

11 A. It's different images from over the years, and
12 as much as I like selling my images in the UCLA
13 hospitals, my images have gotten a lot better over the
14 past two years.

15 Q. So these various uses of your images, do you --
16 do you believe you received prestige from the uses?

17 A. Oh, definitely. To be in the commander's
18 office at Edwards Air Force Base, that's huge. I got a
19 nice note from one the generals there, so that's --
20 that's huge.

21 Q. And when you are selected for these particular
22 uses, are you donating the images or licensing them?

23 A. It's all different. Edwards Air Force Base I
24 donated it, because they called, they're interested. I
25 mean, they probably would have paid but, you know, since

1 servicemen put so much on the line for their lives, risk
2 their lives and everything, the least I could do is
3 offer the image for free and say thank you.

4 Same thing at UCLA hospitals. There's --
5 there's a place for recovering vets, Tiverton House, and
6 they had an image from Fort Irwin of the Painted Rock,
7 which is a really cool place, but it wasn't really high
8 res. So I drove out that day and took a high-res image
9 of the Painted Rock, and high-res panorama, and I gave
10 it to them for free to print. I mean, they paid for the
11 print to put it up there, but -- but, yeah, there's a
12 lot of joy in photography, where, you know -- where
13 you're serving people, so...

14 Q. So in those instances, you know, the service or
15 the prestige is more important than, you know, the
16 amount you would typically receive for the sale?

17 A. Yeah. You think about a service member who is
18 injured. I mean, what's more important? You know, you
19 can't really start talking about money in that sense.

20 Q. So in addition to license, do you ever assign
21 your copyrights?

22 A. No. I try not to. As a general principle, I
23 try to own everything I do.

24 Q. And you said before that, you know, you do both
25 exclusive and nonexclusive licenses. You know, is -- is

1 there a percentage of what's typical of what you do more
2 often?

3 A. Definitely nonexclusive. I'm trying to
4 think -- I'm not sure. I might have only done
5 nonexclusive. I'm not sure if I've done an exclusive
6 yet, but I think I still retain the rights. So, yeah --
7 yeah. Generally it's -- I do mostly nonexclusive.

8 Q. And are you -- are you ever hired to take
9 photos on assignment?

10 A. No. I had a strange philosophy when I got into
11 this: It was I'm going to shoot what I want to shoot
12 when I want to shoot it. So that's definitely a
13 long-term approach to photography.

14 Q. So would you characterize your photography more
15 as freelance?

16 A. No. I'm a fine arts photographer. One of my
17 heroes is Ansel Adams, and he struggled his whole life
18 to make ends meet for most of his life. And, you know,
19 Christies, one of his prints that sold -- being sold for
20 close to a million dollars recently. Of course he's
21 passed on. But it's kind of in the arts, you have a lot
22 of -- you're driven by perfecting the shot and getting
23 the best shot.

24 For instance, the Death Valley lake shots, I
25 mean, Death Valley is a popular place to shoot, but I

1 was the only one to get those lake shots, so and there's
2 like, a lot of prestige in that throughout community and
3 things like that. So that's what you're all aiming for
4 and building that up over time.

5 Q. So is there -- do you ever work with a company
6 or a publication regularly?

7 A. No, I don't.

8 Q. So would you say that photography is your
9 full-time job?

10 A. Yes.

11 Q. Do you list photographer as your profession on
12 a tax return?

13 A. Yes. "Fine art photographer."

14 Q. And regarding enforcement of your copyright,
15 how much time do you spend doing that?

16 A. Not a whole lot. I mean, in the past month,
17 I've probably done it not at all. I've been out in
18 Utah, Yosemite, and Yellowstone. A week ago today I was
19 photographing wolves at Yellowstone. So, yeah, I
20 devoted myself to being on the road just pushing limits
21 and getting -- getting really great shots.

22 Q. So from enforcement, do you receive any profit
23 or incomes from -- from that?

24 MS. ZAHARIA: I'm going to object to the extent
25 this calls for attorney-client communications.

1 BY MS. GATES:

2 Q. You can answer to the extent it doesn't get
3 into any privileged communication.

4 THE WITNESS: Yes. In various forms, yes.

5 BY MS. GATES:

6 Q. When you refer to "various forms," what do you
7 mean?

8 A. Well, relying on the expertise of attorneys,
9 sometimes it's license, sometimes it's taken down,
10 sometimes it's used, sometimes they pay. So basically
11 I'm an expert in photography, but I'm not an expert in
12 copyright infringement, so I leave that up to my
13 attorneys pretty much a hundred percent.

14 Q. So you rely on your attorneys to enforce your
15 copyright; is that correct?

16 A. Yes.

17 Q. And would you say that you generate any income
18 from your attorneys' enforcement efforts?

19 A. Yes.

20 Q. And about how much income a month do you
21 generate from enforcement?

22 A. Well, I consider it the same as the licensing.
23 So basically somewhere -- I mean, in the ballpark
24 figures -- I mean, it varies so much from case to case,
25 from use to use. It's so hard to put, like, a monthly

1 estimate.

2 Q. Can you estimate what a good month would be for
3 receiving income from enforcement?

4 A. 5-, 6-, \$7,000.

5 Q. So is that the same number you referred to
6 earlier regarding good months for licensing?

7 A. Yeah. Because I -- well, it's the same -- it's
8 a similar thing as to licensing, because some of it is
9 more akin to licensing, some of it is more akin to -- I
10 mean, a lot of it is confidential, so all the details
11 and nuts and bolts. There are many varied different
12 ways that it works, so those numbers are kind of like
13 part of the same pie. So, yeah, that's -- that's
14 around -- I mean, it's very differentiated depending so
15 much on who's using it, how they -- you know, how they
16 used it and all that. But yeah, a hundred percent I
17 rely on the expertise of my attorneys.

18 Q. And when you referred to 5-, 6-, 7,000 for
19 licensing and enforcement, is that the same number for
20 each where it would be 5-, 6-, 7,000 for licensing and
21 enforcement, or are you considering those -- those two
22 concepts separately?

23 A. I'm combining those two concepts. I can't
24 really differentiate them because the way that all the
25 deals are worked out, it's all this varies, like,

1 whether some combination of licensing enforcement or
2 licensing and enforcement. So I don't fully understand
3 all the details all the time, but I rely on my
4 attorneys.

5 Q. So in a good month when you say you probably
6 receive 5-, 6-, \$7,000, that's from both licensing and
7 enforcement together?

8 A. Yes.

9 Q. Now, aside from your attorneys, who are
10 representing you here today, do you work with any other
11 attorneys?

12 A. Yes.

13 Q. Could you provide the names of those attorneys?

14 A. Yes. I've worked with Higbee & Associates and
15 Steve Vondran.

16 Q. And do your attorneys represent you on a
17 contingency basis?

18 A. Yes.

19 Q. Do you receive any income from litigation
20 settlements?

21 MS. ZAHARIA: Objection.

22 BY MS. GATES:

23 Q. You can answer.

24 A. Yes.

25 Q. About how much income a month, on a good month,

1 do you receive from litigation, a settlement?

2 A. Oh, I put that all as part of the copyright
3 enforcement and licensing.

4 Q. So about 5-, 6-, or \$7,000 on a good month,
5 that is attributed to licensing enforcement and
6 litigation income?

7 A. Yes.

8 MS. ZAHARIA: Counsel, I'm going to ask to take
9 a quick break.

10 Before we go off the record, we want to
11 designate this transcript as "confidential."

12 MS. GATES: We can do the temporary designation
13 and then, you know, go through it portion by portion
14 within the 30 days as allotted by the protective order.

15 MS. ZAHARIA: That's fine.

16 MS. GATES: How many -- how much time do you
17 need?

18 MS. ZAHARIA: About five minutes.

19 MS. GATES: Okay.

20 (Recess)

21 MS. GATES: Okay. We are back on the record
22 now.

23 BY MS. GATES:

24 Q. I'll remind you that you're still under oath.
25 Did anyone else come back into the room with

1 you when you sat down?

2 A. No.

3 Q. Okay. So you had testified earlier that you
4 have a website; is that correct?

5 A. Yes, I have a couple.

6 Q. Could you provide the URLs of your website?

7 A. One is emcgucken.com, one is just mcgucken.com,
8 and those are my main photography sites. There's also
9 mcguckenarts.com -- or mcguckenart.com.

10 Q. So do you post photos directly on your
11 websites?

12 A. Yes.

13 Q. And how do you differentiate between the three
14 different websites?

15 A. Mcguckenart.com is more portraiture and some of
16 my surf photography. Mcguckenart.com is a bit of an
17 older version, emcgucken.com is a newer version. And
18 also, mcgucken.com has more of my physics on it and my
19 books on photography and art.

20 Q. So how often do you post photos to your
21 websites?

22 A. It varies. I haven't posted photos there very
23 recently. Maybe a few months ago or more.

24 Q. And when you say "there," are you referring to
25 a specific website or all three?

1 A. Emcgucken.com, I think I updated that around
2 this time last year.

3 Q. And what about the mcgucken.com?

4 A. I have not updated that in recent memory.

5 Q. So when you do post photos on these websites,
6 do you post all of your photos or a specific batch?

7 A. I -- a specific -- specific number.

8 Q. Which photos do you choose to post?

9 A. The best ones.

10 Q. And do you edit the photos before posting?

11 A. Yes.

12 Q. And when you post images, are they higher --
13 high resolution images?

14 A. Generally, yes.

15 Q. Do you put a watermark on the image?

16 A. No.

17 Q. Why not?

18 A. That kind of went out of style. I think 2012
19 some people Trade Rec (phonetic) put an article about
20 it, just said it ruins the experience of the image.

21 Q. So you post the high-resolution edited image as
22 is on your website?

23 A. Yes.

24 Q. And do you provide any credit or attribution
25 information along with the image?

1 A. It varies. Some of it have it embedded in the
2 EXIF and some on the page, so, yes.

3 Q. Do you take any specific measures to protect
4 the images from someone copying them?

5 A. On the -- no. On the Internet, people can copy
6 whatever they see.

7 Q. What do you mean when -- "people can copy
8 whatever they see"?

9 A. People can copy images from the Internet.

10 Q. Do you mean that they are permitted to copy
11 images from the Internet or they, you know, are
12 physically capable of copying images from the Internet?

13 A. They're physically capable.

14 Q. Are people permitted to copy images from your
15 website?

16 A. No. But if they view it on their computer,
17 they have a copy on their commuter, so I'm not sure I
18 understand the question.

19 Q. What do you mean when they -- when you say that
20 they have a copy on their computer?

21 A. When they view an image on their computer, they
22 have a copy of the image on their computer.

23 Q. Do you mean physically saved on their computer?

24 A. It's present in their browser, so it might also
25 be in the cache, so it might or might not be saved. But

1 presumably, to see an image, it's been downloaded on the
2 computer, so it's on the computer.

3 Q. And are you concerned that your images are
4 copied or may be saved on computers by other users?

5 A. It depends on the user.

6 Q. Would you want to use low-resolution images for
7 this reason?

8 A. I shoot with high-quality cameras, and people
9 like seeing the detail of my work. It's part of my
10 brand.

11 Q. So for that reason, you want to post a
12 high-quality version on your website; correct?

13 A. Yeah. It's -- it's the finest lab, the finest
14 cameras, and people enjoy seeing the details.

15 Q. So going back to -- you said you choose for the
16 best versions of the photographs. How do you make those
17 selections?

18 A. Artistic opinions as I go through them.

19 Q. So your own personal opinion, or do you look to
20 others?

21 A. Oh, 100 percent my personal opinion.

22 Q. So when you post these high-quality images on
23 your website, do you expect that any of them may be
24 copied?

25 A. To the extent that when someone views it,

1 they'll have a copy on their computer, yes.

2 Q. And what about other types of copies?

3 A. What do you mean?

4 Q. Do you expect -- do you expect that someone
5 would physically download the image from your website?

6 MS. ZAHARIA: Objection.

7 BY MS. GATES:

8 Q. You can answer.

9 A. I want people to see my images.

10 Q. So are you okay with people downloading images
11 from your website?

12 MS. ZAHARIA: Objection. Vague.

13 BY MS. GATES:

14 Q. You can answer.

15 A. I'm not sure it's possible to see an image
16 without downloading it.

17 Q. Did you set up your website yourself or did
18 someone else do that?

19 A. Different websites have their own protocols,
20 so, basically, I -- I'm using SmugMug for most of those
21 websites, so SmugMug set them up. But I edited it,
22 so...

23 Q. Does SmugMug provide a template website --

24 A. Yes.

25 Q. -- for you to -- got it.

1 And on your web page, do you also link to any
2 social media accounts?

3 A. I believe I link to my photography social
4 media.

5 Q. What social media accounts do you have?

6 A. Facebook, Instagram, maybe a couple on
7 Facebook. I have a couple or few Instagrams and Flickr
8 accounts, but that's -- that's about it.

9 Q. And do you post your photos on all these
10 different social media accounts?

11 A. Yes.

12 Q. Go ahead.

13 A. Yes.

14 Q. Let's start with Facebook. Do you have one
15 Facebook account or multiple Facebook accounts?

16 A. I have one personal Facebook account and then
17 various Facebook pages.

18 Q. By "Facebook pages," what are you referring to?

19 A. Are you familiar with Facebook pages?

20 Q. Yes, but I just want a -- a clean record --

21 A. Yes.

22 Q. -- so anyone who is reading this back will
23 understand.

24 A. It's a group devoted to your work, I describe
25 it.

1 Q. So you have one Facebook account. Is that for
2 you personally?

3 A. Yes.

4 Q. And then the Facebook pages you're referring
5 to, are those personal or professional?

6 A. Both. They're both.

7 Q. Do you recall the names of these different
8 Facebook pages?

9 A. Yes.

10 Q. Could you provide them now?

11 A. Maybe not all of them, but I recall mostly.
12 Elliot McGucken is a page, Fine Art Ballet is a page,
13 Golden Number Ratio is a page, McGucken Physics or
14 Elliot McGucken Physics is a page, Ethic Landscape
15 Photography might be a page, Golden Number Ratio, I
16 think I already said that one. Those are my most
17 prominent pages. I may have a couple others.

18 Q. And when you say "most prominent," what do you
19 mean?

20 A. The ones with the most followers.

21 Q. About how many followers do you have, for
22 example, on your most prominent Facebook page?

23 A. I would have to check, but Elliot McGucken
24 photography one, I'm not sure but maybe around 6,000,
25 maybe a little bit over. Golden number ratio maybe has

1 around 6,000. And Elliot McGucken Physics maybe around
2 6,000. I know that they are all in that ballpark. I'm
3 not sure of it exactly. It fluctuates.

4 Q. And when you say "golden number ratio," what
5 does that mean?

6 A. The "golden number" is the mathematical
7 formula -- it's a mathematical number, and I use it in
8 my composition. It's a ratio that artists use.

9 Q. When you say you use it in your composition,
10 what do you mean?

11 A. For instance, taking one of the pictures of the
12 Death Valley lake, I put the horizon as the golden ratio
13 between the top of the sky and the mountain of the
14 photograph, and a lot of people have used this
15 compositional technique throughout classical art.

16 Q. Is there a specific person that this ratio is
17 attributed to, as the -- you know, the creator?

18 A. Well, I mean, the geometry of the human body is
19 all nature, and it goes back to Euclid's Elements, the
20 first step in geometry. And it's also called "phi"
21 after Phidias, who I believe, was an Athenian architect,
22 so those are some of the devisers and users of it.
23 Leonardo Da Vinci, many people use it.

24 THE REPORTER: I'm sorry. That answer was a
25 little bit technical. Can you repeat that again,

1 please?

2 THE WITNESS: Sure.

3 The golden ratio has been used throughout
4 antiquity, and it's also known as phi, p-h-i. I believe
5 legend has it it was named after Phidias, who I believe
6 was credited with the Parthenon, and many famous artists
7 such as Leonardo da Vinci have employed it throughout
8 their art, the golden proportion. Also, it infuses the
9 geometry of the human body, so it's natural -- it's
10 naturally associated with beauty.

11 THE REPORTER: Thank you.

12 THE WITNESS: Sure.

13 BY MS. GATES:

14 Q. So you mention you have a Facebook account and
15 a few different Facebook pages. You know, how active
16 are you on Facebook?

17 MS. ZAHARIA: Objection.

18 BY MS. GATES:

19 Q. You can answer.

20 A. Fairly active. Maybe I post once or twice a
21 day -- I mean, once every two days or so.

22 Q. How often do you check your account?

23 A. What aspects of the account?

24 Q. I just mean in addition to posting, do you, you
25 know, check your accounts a few times a day? A few

1 times a week?

2 A. Maybe, like, once a day. You get notifications
3 on your phone, so it depends what you see coming
4 through. Once a day.

5 Q. So you have a notification set up where it
6 sends you a message on your phone?

7 A. Not everything. It's kind of whatever is
8 default, I just -- I tend to -- I don't do too much
9 fibbling (phonetic).

10 Q. Do you know if your account is publicly
11 accessible on Facebook?

12 MS. ZAHARIA: Objection. Vague.

13 BY MS. GATES:

14 Q. You can answer.

15 A. I believe it is.

16 Q. Do you know where you would need to go to check
17 to see if your account is public?

18 A. Facebook.com/Elliot McGucken, my photography
19 account.

20 Q. Do you understand what the difference is
21 between a public account and a private account on
22 Facebook?

23 A. Yes.

24 Q. Could you describe what the difference is to
25 these?

1 A. If you want people to see your photography, you
2 tend to go towards the more public account, and if you
3 don't want people to see your photography, I presume you
4 tend towards a more private account.

5 Q. So is it accurate that you've chosen the public
6 account in order for people to see your photography?

7 A. Yes.

8 Q. Have you ever read any of the terms of service
9 or policies that Facebook provides?

10 MS. ZAHARIA: Objection.

11 BY MS. GATES:

12 Q. You can answer.

13 A. Not directly, but I do have general knowledge
14 because they're all posting excerpts on different
15 websites.

16 Q. When you say "posting excerpts," what are you
17 referring to?

18 A. Just throughout the photo bloggers here, you
19 just hear news about terms of service here and there,
20 so.

21 Q. So you read the excerpts through the photo
22 blogs?

23 A. Just the general news regarding them.

24 Q. Is there any specific news you're referring to?

25 A. Oh, I mean, this has been going on for years.

1 Now and then -- I can't remember specific examples, but
2 some platform will make a "rights grab." So they get
3 bad news, and then they change it back to, like, not
4 doing the rights grab, so it turns into good news. So
5 in general, they just get a feel for it. And a lot of
6 experts weigh in, and I'm not really an expert, so
7 that's how I get my news a lot of times.

8 Q. And what do you mean by a "rights grab"?

9 A. I think that's a nebulous term, but it's, like,
10 you just see it on the comments, because so many
11 photographers say it, like, "They made a rights grab."
12 So then you, like, know not to use that website. Or if
13 they say they no longer have a rights grab, then the
14 website is okay. Again, it's this kind of vague just
15 memory over the years, there's a back and forth.

16 Q. So if you read that specific website was
17 "making a rights grab," as you put it, you would not
18 want to use that website?

19 A. Probably not, no.

20 Q. Are there any websites that you're not using
21 right now because of this reason?

22 A. Probably. I can't think of any off the top of
23 my head, but if a website was doing it, I just wouldn't
24 use them in the first place, so...

25 Q. Have you ever stopped using Facebook because of

1 the "rights grab," as you put it?

2 A. No. I always think that there's -- any "rights
3 grab" headlines would change within a day or so, or just
4 somebody could -- no, I've never stopped using Facebook.
5 It seems like it's resolved really quick.

6 Q. Would you ever stop using other social media
7 accounts like Instagram because of that reason?

8 A. I --

9 (Simultaneous colloquy)

10 MS. ZAHARIA: Objection.

11 BY MS. KIM:

12 Q. Have you ever stopped using Instagram at any
13 point?

14 A. No.

15 Q. So how many Instagram accounts do you have?

16 A. I have four main ones, and I just set up, I
17 believe, a fifth for sculpture, because I'm doing
18 sculpture.

19 Q. When you say "doing sculpture," do you mean
20 creating sculpture?

21 A. Yes.

22 Q. And what are the names of your Instagram
23 accounts?

24 A. Elliot McGucken, 45SURF, Fine Art Ballet,
25 Golden Number Ratio, and McGucken Sculpture.

1 Q. And how do you differentiate between those
2 accounts?

3 A. Well, most of the names say most of it all.
4 45SURF is a lot of surf photography. Fine Art Ballet is
5 a lot of my ballet photography, golden number ratio is
6 some of my photography showing the golden ratio and some
7 classics showing golden ratio, and McGucken Sculpture is
8 my sculpture.

9 Q. So how often do you post on those accounts?

10 A. Maybe two or three times a day for my most
11 active one, as COVID kind of put a halt on a lot of surf
12 photography. That's the same as the ballet photography,
13 because they haven't been active. So those accounts
14 haven't been posted for maybe a year since the shutdown
15 began, so McGucken Photography -- Elliot McGucken, about
16 three times a day, two or three times a day.

17 Q. Do you also check your account for
18 notifications two to three times a day?

19 MS. ZAHARIA: Objection. Vague.

20 BY MS. GATES:

21 Q. You can answer.

22 A. Not -- not hugely. I mostly post. Every time
23 you post, you see what comes in, so. Yes, I mean, I --
24 I'm not really conscious of it. It's just there.

25 Q. So of those Instagram accounts, is there an

1 account that you would characterize as your primary
2 account?

3 A. Elliot McGucken.

4 Q. Is that the landscape account?

5 A. Yes.

6 Q. Is that account public?

7 A. Yes.

8 MS. ZAHARIA: Objection. Vague.

9 BY MS. GATES:

10 Q. And do you understand the difference between
11 Instagram's public and private account options?

12 A. Yes, I've seen some private accounts.

13 Q. So on that account, do you mostly post your
14 landscape photography?

15 A. Elliot McGucken account?

16 Q. Correct.

17 A. Yes.

18 Q. Do you -- so the photos -- the photos you post
19 on that Instagram account, do you also post them
20 elsewhere such as on your website or Facebook?

21 A. Yes. I'll post them also in -- on Flickr, on
22 Facebook, yes.

23 Q. So for a single photo that you may post on your
24 Instagram account, would you post that same photo
25 multiple different places online?

1 A. Maybe two places, two or three.

2 Q. How do you decide where to post photos?

3 A. Different places have different audiences, and
4 you're trying to reach different audiences.

5 Q. Would you post the exact same photo across
6 different accounts, or would you modify it in some way?

7 A. Mostly the same. Sometimes editing for color a
8 little bit, but mostly the same.

9 Q. So when you post on social media, do you edit
10 the photos before posting?

11 A. Barely at all, if ever.

12 Q. Do you edit within the application or
13 separately on your computer?

14 MS. ZAHARIA: Objection. Vague.

15 BY MS. GATES:

16 Q. You can answer if you understand.

17 A. I edit most by large 99.9 percent of my...

18 Q. What software do you use to edit photo?

19 A. Adobe Lightroom and Photoshop.

20 Q. Do you have a Twitter account?

21 A. Yes. Barely -- I have a few of them, but I
22 barely use them.

23 Q. When you -- when you say "barely use them,"
24 what are you referring to?

25 A. Well, I think when I post to Elliot McGucken,

1 sometimes it automatically posts to my Twitter account
2 also.

3 Q. Are you referring to your Instagram account?

4 A. Yeah, when I post on my Instagram account, it
5 automatically posts to Twitter sometimes.

6 Q. Do you select that option, or is it a default
7 option?

8 A. I mean, you can turn it on and off, but yeah, I
9 select to share it on Twitter.

10 Q. So do you also post photos on Twitter?

11 A. Yes. I never log -- really log in and check
12 Twitter, but the posts go there from Instagram.

13 Q. Do you ever post separately on Twitter
14 different from what you're posting on Instagram?

15 A. Rarely. Some of my physics, but rarely.
16 That's pretty rare.

17 Q. You said you had multiple Twitter accounts.
18 Can you provide the names of the accounts?

19 A. I think there's just 45SURF, and then there's
20 an Elliot McGucken, and there might be one devoted to my
21 physics, but it hasn't been active for years. Twitter
22 is not a good place for physics.

23 Q. Why is that?

24 A. I think the 140-character limit, there's not
25 too much to do for physics.

1 Q. You said you also have a Flickr account; is
2 that correct?

3 A. Yes.

4 Q. Do you have multiple Flickr accounts?

5 A. I have two, but one hasn't been active for
6 years.

7 Q. So for the active account, how regularly do you
8 use it, that account?

9 A. Once every few days I'll post there.

10 Q. And --

11 A. Sometimes more often.

12 Q. What is the name of the account?

13 A. It's Hero's Odyssey Mythology Photography, I
14 believe.

15 Q. Is there a specific reason you chose that name?

16 A. Yes. My photography is inspired by mythology.

17 Q. So on this Flickr account, do you post all of
18 your photos or a trimmed down batch of photos?

19 A. A trimmed down batch.

20 Q. How do you select the photos that you post on
21 Flickr?

22 A. After returning from a shoot, you go through
23 the best photos and you finish the best.

24 Q. Do you post the high-quality, high-resolution
25 versions on Flickr?

1 A. Yes.

2 Q. So are these the same photos that you would
3 post on your website?

4 A. Yes.

5 Q. And are these the same photos that would you
6 post on Instagram?

7 A. Yes. But Instagram scales them down.

8 Q. What do you mean by "scales them down"?

9 A. Instagram compresses images.

10 Q. So compresses the image size?

11 A. Yes.

12 Q. Does that affect the quality of the photo?

13 A. Depending what you want to do with it. If you
14 want to print it, yes.

15 Q. And on Flickr, could you post the same photos
16 as you would on Facebook?

17 A. I probably post more to Flickr.

18 Q. Do you have any other social media accounts
19 that you regularly post photos on?

20 A. No. Those -- that wraps it up, I believe.

21 Q. Are there any other places online that you
22 share photos?

23 MS. ZAHARIA: Objection. Vague.

24 BY MS. GATES:

25 Q. You can answer if you understand.

1 A. Not beyond what we've discussed really. I
2 can't think off the top of my head.

3 Q. So why is it that you post photos on your
4 website, Instagram, Facebook, and Flickr?

5 A. To build my name.

6 Q. Can you elaborate on that answer?

7 A. Yes, to build my name and brand as a good
8 photographer.

9 Q. Is it important to share photos on your website
10 and social media in order to build your name?

11 A. Yes.

12 Q. Are there any other reasons you post photos on
13 your website and social media?

14 A. To share the art.

15 Q. Is it important to post photos on your website
16 and social media in order to be able to share the art
17 with others?

18 MS. ZAHARIA: Objection. Vague.

19 BY MS. GATES:

20 Q. You can answer.

21 A. Yes.

22 Q. Are there any particular audiences or people
23 you're trying to reach by posting your photos on your
24 website and social media?

25 A. Anyone who loves my photography is welcome to.

1 Q. And when you say "welcome to," what do you
2 mean?

3 A. They're welcome to love my photography.

4 Q. So posting on your website and social media,
5 are you inviting people to view your photography or
6 share it?

7 A. View it.

8 MS. ZAHARIA: Objection. Vague and ambiguous.

9 THE REPORTER: I'm sorry. I didn't get the
10 answer.

11 THE VIDEO TECHNICIAN: View it.

12 BY MS. GATES:

13 Q. Do you want people to share your photography?

14 A. Not illegally.

15 Q. So you only want people to share your
16 photography legally?

17 A. Yes.

18 MS. ZAHARIA: Objection. Calls for a legal
19 conclusion.

20 Counsel, can we take another five-minute break?

21 MS. GATES: Okay. Let's keep it to five
22 minutes, though.

23 MS. ZAHARIA: I'm going to go off the record.

24 Elliot, please mute yourself.

25 (Recess)

1 MS. GATES: All right. I'd like to share an
2 exhibit here. Bear with me while I pull it up on the
3 screen.

4 BY MS. GATES:

5 Q. Do you recognize this document?

6 A. Yes.

7 Q. Is this a screenshot of your website
8 mcgucken.com?

9 A. Yes.

10 MS. GATES: Great. Let's go ahead and mark
11 this as -- let's do Defendant's Exhibit 1.

12 (Exhibit 1 remotely introduced and marked)

13 BY MS. GATES:

14 Q. So looking at this screenshot here, what are
15 these two images of cameras on the left-hand side?

16 A. The Nikon D810 or D850, and the lens
17 14-24 millimeters.

18 Q. Why are those images on your website?

19 A. Affiliate Amazon sales.

20 Q. So what is an affiliate Amazon sale?

21 A. You earn money by selling Amazon products.

22 Q. So if I were to click on this website, it would
23 take me to Amazon?

24 A. I'm not sure if it's active, I haven't checked,
25 or updated.

1 Q. But the purpose is to link to an Amazon
2 listing; is that correct?

3 A. Yes.

4 MS. ZAHARIA: Objection. Vague.

5 BY MS. GATES:

6 Q. How many affiliate links do you have on this
7 website?

8 A. I don't know.

9 Q. Do you receive any income from affiliate links?

10 MS. ZAHARIA: Objection. Vague.

11 BY MS. GATES:

12 Q. You can answer.

13 A. Barely.

14 Q. What do you mean by "barely"?

15 A. Under a hundred dollars a year.

16 Q. And that's for all of the affiliate links on
17 the website?

18 A. I believe.

19 Q. What is this large image here on which it says
20 "McGucken Fine Art"?

21 MS. ZAHARIA: Objection. Vague.

22 THE WITNESS: What is that image? I'm not sure
23 I understand your question.

24 BY MS. GATES:

25 Q. I'm just looking at this image on the first

1 page of the screenshot here that appears to show a
2 physical space with several prints --

3 A. Oh, that's --

4 (Simultaneous colloquy)

5 BY MS. GATES:

6 Q. -- that --

7 A. That's the gallery that I spoke of, 2013 about.

8 Q. So this gallery is no longer in existence?

9 A. No.

10 Q. Do you ever get any custom quotes or orders?

11 MS. ZAHARIA: Objection. Vague.

12 BY MS. GATES:

13 Q. You can answer if you understand.

14 A. This site, no.

15 Q. Not from this site or not at all?

16 A. Not from this site.

17 Q. Do you get any custom quotes or orders from a
18 different website?

19 A. Maybe a couple.

20 Q. Are you referring to a couple of quotes or
21 orders?

22 A. Yes.

23 Q. How often do you receive custom quotes or
24 orders?

25 A. Not often at the moment.

1 Q. In the past, was it more often before the
2 pandemic?

3 A. A bit more.

4 Q. So what would be an example of a custom quote
5 or order?

6 A. Somebody wants some images printed for their
7 office.

8 Q. And you're referring to your images or someone
9 else's images?

10 A. My images.

11 Q. Do buyers often contact you for prints
12 specifically for their offices?

13 A. Sometimes. Not too often.

14 Q. When buyers contact you for prints, do you
15 understand what the use is; whether it's for the office
16 or personal?

17 MS. ZAHARIA: Objection. Vague.

18 THE WITNESS: Generally.

19 BY MS. GATES:

20 Q. It's generally the office or generally
21 personal?

22 A. Oh, well office is the one I'm thinking of.

23 Q. So -- so buyers most often request prints for
24 office uses; is that correct?

25 A. Yes.

1 Q. And do these buyers find you through your
2 website?

3 A. Partially through word of mouth.

4 Q. How do they contact you?

5 A. E-mail or phone.

6 Q. About how many e-mails do you get per day?

7 A. Not many. Zero average per day.

8 Q. You get zero e-mails a day?

9 A. How many -- is the question how many total
10 e-mails do I get?

11 Q. Yes.

12 A. Pertaining to my art or just e-mail?

13 Q. Pertaining to your photography.

14 A. Zero today.

15 Q. On an average day, how many e-mails do you get
16 pertaining to your photography?

17 A. Zero.

18 Q. What about phone calls?

19 A. Zero.

20 Q. Do you know why that is?

21 A. I haven't been pushing or advertising the
22 prints.

23 Q. And what about licensing? Do you receive any
24 e-mails or phone calls related to license inquiries?

25 A. Occasionally.

1 Q. How often is that?

2 A. Once -- once every six months or so.

3 Q. So would you characterize your photography as
4 more a hobby or a paid profession?

5 A. It's a --

6 MS. ZAHARIA: Objection.

7 BY MS. GATES:

8 Q. You can answer.

9 A. It's a profession. I'm building a long-term
10 brand.

11 Q. So looking back at this Exhibit 1, what are
12 these yellow outlined images at the top of the screen?

13 A. Those are books that I wrote.

14 Q. Are these photography specific books or physics
15 books?

16 A. Some are physics, some are photography, and one
17 is poetry, and one is about the Tao.

18 Q. And do you know if I were to click on of these
19 books, would it direct me to a separate website?

20 A. I believe it takes you to Amazon.

21 Q. And that's where the books are being offered
22 for sale?

23 A. Yes.

24 Q. So before when we were talking about your
25 long-term branding, what did you mean by "long-term"?

1 A. That's variable, but long -- long-term, in it
2 for life.

3 Q. Are you envisioning a specific number of years?

4 MS. ZAHARIA: Objection. Vague.

5 BY MS. GATES:

6 Q. You can answer if you understand.

7 A. I'm not sure I understand in this context.
8 Could you please clarify?

9 Q. When you're using the term "long-term," are you
10 referring to a specific number of years?

11 A. I don't really have a specific number of years
12 in mind.

13 Q. What do you have in mind?

14 A. Long-term, putting a space and creating the
15 best art.

16 Q. Would you say that "long-term" specifies five
17 years or ten years?

18 A. I'm not sure I can put that into terms. Ansel
19 Adams just sold a print for around a million dollars. I
20 think it was upwards 75 years after he shot it, maybe
21 more.

22 Q. Have you ever done any work for "National
23 Geographic"?

24 A. No.

25 Q. And do you know, for your website, if you have

1 any terms and conditions or privacy policies?

2 MS. ZAHARIA: Objection. Vague.

3 THE WITNESS: I don't believe anything beyond
4 what SmugMug would have.

5 BY MS. GATES:

6 Q. So SmugMug provided everything you needed for
7 the website?

8 A. I believe. This site is hosted on SmugMug.

9 Q. Have you read the amended complaint in this
10 case?

11 A. Briefly.

12 Q. Were you involved in the preparation of the
13 amended complaint?

14 MS. ZAHARIA: Objection. Calls for
15 attorney-client communications.

16 BY MS. GATES:

17 Q. To the extent, you know, outside privileged
18 communications, can you state "yes" or "no" if you were
19 involved in the preparation of the amended complaint?

20 A. I believe so.

21 Q. Stating "yes" or "no," did you see any drafts
22 of the amended complaint before it was filed?

23 A. I'm not sure.

24 Q. You can't recall?

25 A. I've seen many documents. I don't recall

1 specifically.

2 Q. Are you familiar with the allegations in the
3 amended complaint?

4 MS. ZAHARIA: I'm going to object to the extent
5 it calls for attorney-client communication.

6 BY MS. GATES:

7 Q. To the extent it doesn't get into any
8 privileged communication, are you familiar with the
9 allegations in the amended complaint?

10 A. I believe so.

11 Q. What is that belief based on?

12 MS. ZAHARIA: And I'm going to object to the
13 extent it calls for attorney-client communications.

14 BY MS. GATES:

15 Q. To the extent it doesn't get into any
16 attorney-client communication.

17 A. I know what the case is about, but I'll leave
18 the details to my attorneys.

19 Q. Were you involved in the discovery process in
20 this case, to the extent it doesn't get into any
21 privileged communications?

22 A. This is part of the discovery process; right?

23 Q. Correct.

24 A. Well, then I think, yes, I'm involved.

25 Q. How would you describe this case?

1 MS. ZAHARIA: I'm going to object to the extent
2 it calls for a legal conclusion.

3 BY MS. GATES:

4 Q. You can answer to your general knowledge.

5 A. I'm no expert, but we have a constitution which
6 assigns an artist's rights to their creations.

7 Q. How would you describe this case to a friend?

8 MS. ZAHARIA: I'm going to object as vague and
9 calls for a legal conclusion.

10 BY MS. GATES:

11 Q. You can answer.

12 A. I would have them read the copyright clause of
13 the United States Constitution.

14 Q. Have you ever seen any document request in
15 connection with this case?

16 MS. ZAHARIA: Objection to the extent it calls
17 for attorney-client communications.

18 BY MS. GATES:

19 Q. You can answer so long as it doesn't get into
20 any privileged communication.

21 A. I believe documents were requested.

22 Q. Did you read those document requests?

23 A. I'm not sure if I read them or -- I provided
24 documents that were requested.

25 Q. So you searched for documents to produce in

1 this case?

2 A. Yes.

3 Q. Where did you search for documents?

4 A. In my e-mail.

5 Q. Did you search anywhere else?

6 A. I don't believe so. Maybe the copyright
7 office, if that counts, or -- but I believe that's about
8 it. Maybe correspondence concerning the use of my
9 images.

10 Q. And without getting into any privileged
11 communications, did you give these documents to your
12 counsel?

13 A. I gave what was requested.

14 Q. Did you provide all responsive documents within
15 your possession?

16 A. I believe so.

17 Q. Are there any further responsive documents that
18 you have not given to counsel?

19 A. No, I don't believe so.

20 Q. So going back to your point about the
21 constitution: When you're -- you're speaking with a
22 friend, how would you describe the case after the point
23 you made about the Constitution?

24 MS. ZAHARIA: Objection to the extent this
25 calls for attorney-client communication.

1 BY MS. GATES:

2 Q. Your not lawyer friend.

3 MS. ZAHARIA: Same objection.

4 BY MS. GATES:

5 Q. You can answer.

6 A. I'm no expert, but one person can't use your
7 photograph without your consent, I believe.

8 Q. Would you say anything else?

9 MS. ZAHARIA: I'm going to object to the extent
10 this calls for attorney-client communications.

11 BY MS. GATES:

12 Q. You can answer to the extent it doesn't get
13 into privileged communications.

14 A. It depends on the friend I was talking to.

15 Q. Why does it depend on the friend you're talking
16 to?

17 MS. ZAHARIA: Same objection. I'm going to
18 instruct the witness to not disclose any attorney-client
19 or privileged material, and it's vague.

20 BY MS. GATES:

21 Q. You can answer with that instruction in mind.

22 A. Some of my friends have law degrees.

23 Q. So before you had mentioned the copyright
24 office. Do you file applications for registration of
25 your photographs to the copyright office?

1 A. I do.

2 Q. Do you personally fill out the applications and
3 file them?

4 A. I do.

5 Q. How do you file them?

6 MS. ZAHARIA: Objection. Vague.

7 THE WITNESS: In the manner they request.

8 BY MS. GATES:

9 Q. And you file them in hard copy or using the
10 copyright office's electronic system?

11 A. I believe it's only electronic now.

12 Q. So you have an electronic copyright office
13 account?

14 A. Yes.

15 Q. How often do you file applications for
16 registration with the copyright office?

17 A. It varies.

18 Q. How about in a typical month? How many
19 applications would you file for registration?

20 A. Depends on the month. Zero to many.

21 Q. Last month, how many applications for
22 registration did you file with the copyright office?

23 A. February, maybe I did two last February. Maybe
24 I did three. I'm doing some sculpture ones now.
25 February, maybe two, or three, or four.

1 Q. How do you choose when to prepare an
2 application for registration?

3 MS. ZAHARIA: Objection. Vague.

4 BY MS. GATES:

5 Q. You can answer.

6 A. It varies.

7 Q. What do you mean by "it varies"?

8 A. Sometimes I'm on the road for months at a time,
9 so it's harder.

10 Q. So would you not prepare and file an
11 application for registration while you're on the road?

12 A. I would.

13 Q. And based off the contents of what's covered in
14 that location, how do you choose to apply to register
15 something?

16 MS. ZAHARIA: Objection. Vague.

17 THE WITNESS: Based on the contents, I'd follow
18 the copyright rules of the office.

19 BY MS. GATES:

20 Q. Do you register all of your photographs with
21 the copyright office?

22 A. As best I can.

23 Q. What do you mean as best you can?

24 A. I try to register all my photographs.

25 Q. What type of registration do you typically use

1 for your photographs?

2 MS. ZAHARIA: Objection. Vague.

3 THE WITNESS: The form that's provided by the
4 copyright office.

5 BY MS. GATES:

6 Q. Do you know which form you typically use?

7 A. Not off the top of my head. I would have to
8 log in.

9 Q. Do you know how many registrations you
10 currently hold?

11 A. Maybe around 200 total. That's a guess.

12 Q. When did you start filing applications for
13 registration with the copyright office?

14 MS. ZAHARIA: Objection. Vague.

15 THE WITNESS: Back in the '90s, I think.

16 BY MS. GATES:

17 Q. Do you remember the specific year?

18 A. No, I don't remember the year.

19 Q. How did you learn how to fill out and file an
20 application for registration with the copyright office?

21 A. Self-taught.

22 Q. Did anyone train you?

23 A. No.

24 Q. Did you look at any materials online or
25 provided by the copyright office to teach yourself?

1 A. Yes.

2 Q. Do you recall what materials you looked at?

3 A. I don't know specifically. Whatever they
4 provide.

5 Q. Why is it that you started filing registrations
6 with the copyright office in the '90s?

7 MS. ZAHARIA: Objection. Vague.

8 BY MS. GATES:

9 Q. You can answer.

10 A. To protect my copyrights.

11 Q. Did anyone encourage you to file application
12 for registration with the copyright office?

13 MS. ZAHARIA: I'm going to object to the extent
14 this calls for attorney-client communication.

15 BY MS. GATES:

16 Q. You can answer.

17 I'm not asking for specific privilege
18 communication.

19 A. I believe so.

20 Q. Do you recall filing an application for
21 registration, for the photo at issue in this case?

22 A. Yes.

23 Q. Did you file it through your electronic account
24 with the copyright office?

25 A. Yes.

1 Q. Without getting into privileged communications,
2 did anyone assist you in the filing?

3 A. No.

4 Q. And did you receive a registration --

5 A. Yes.

6 Q. -- for the photo at issue?

7 A. Yes.

8 Q. Do you recall when you received that
9 registration?

10 A. I don't know specifically. Maybe a month after
11 I registered it. Yeah.

12 Q. Is that a typical turnaround time from the
13 copyright office, in your experience?

14 A. It varies.

15 MS. GATES: All right. Let's take a look at
16 another document here.

17 BY MS. GATES:

18 Q. Do you recognize this document?

19 A. Yes.

20 Q. Is this a Certificate of Registration that you
21 received?

22 A. Yes.

23 MS. GATES: I'd like to introduce this as
24 Defendant's Exhibit 2.

25 (Exhibit 2 remotely introduced and marked)

1 BY MS. GATES:

2 Q. Do you recall filing the application for this
3 registration?

4 A. Yes.

5 Q. So you personally provided and filled out all
6 the information --

7 A. Yes.

8 Q. -- in this Certificate of Registration?

9 A. Yes.

10 Q. Does this registration cover the photograph at
11 issue in this case?

12 A. Yes.

13 Q. Do you typically file a group copyright
14 registration?

15 A. Various, mostly, probably.

16 Q. Did anyone teach you how to file a group
17 registration?

18 A. No.

19 Q. And this is a registration for published
20 photographs; right?

21 A. Yes.

22 Q. Do you recall where all the photographs listed
23 in the registration were published?

24 A. Facebook.

25 Q. And did you provide the deposit copies that you

1 submitted to the copyright office for production --
2 production in this case?

3 A. Yes.

4 Q. Did you file anything else with the copyright
5 office in connection with this registration?

6 MS. ZAHARIA: Objection. Vague.

7 THE WITNESS: The deposit copies.

8 BY MS. GATES:

9 Q. Did you file a list or an Excel file regarding
10 this photograph in this registration?

11 A. I believe so.

12 Q. Did you provide that Excel file for production
13 in this case?

14 A. I'm not sure.

15 Q. Do you know where that Excel file is located if
16 you needed to look for it?

17 A. I could probably find it. Yeah.

18 MS. GATES: Counsel, we would like to request
19 the Excel file in connection with this registration at
20 this time, since I do not believe we've received it yet.

21 Q. All right. Let's take a look at --

22 MS. ZAHARIA: Counsel, I would just like to
23 note for the record that I believe it's close to noon in
24 California. Do you have an idea of how much
25 longer we'll go and what the plan is for lunch?

1 MS. GATES: I did not make a specific plan for
2 lunch. We're on a different time here. I can -- you
3 know, I can go for another 30 minutes or more and then
4 we can break. What is your preference?

5 MS. ZAHARIA: I mean, does that sound all right
6 with you?

7 THE WITNESS: I'm fine. Yeah, perfect.

8 MS. ZAHARIA: Thank you.

9 BY MS. GATES:

10 Q. Let's take a look at another document. Do you
11 recognize this photograph?

12 A. Yes.

13 Q. Is this a photograph that you took?

14 A. Yes.

15 MS. GATES: All right. I would like to
16 introduce this as Defendant's Exhibit 3. And this is,
17 again, McGucken 1 that was produced.

18 (Exhibit 3 remotely introduced and marked)

19 BY MS. GATES:

20 Q. Do you recall when you took this photograph?

21 A. Yes.

22 Q. What date?

23 A. Early March 2019.

24 Q. And is this photograph that's included in the
25 registration that we just looked at?

1 A. Yes.

2 Q. Is this the photograph that's at issue in this
3 case?

4 A. I believe so.

5 Q. Can you describe what this photograph is
6 depicting?

7 A. Water in Death Valley in front of the Panamint
8 Range.

9 Q. So what brought to you this location in Death
10 Valley?

11 A. Seeking photos of water in Death Valley.

12 Q. Do you recall how many photographs you took of
13 this location at that time?

14 A. Probably a few hundred.

15 Q. Is that typical, to take a few hundred
16 photographs of a specific location?

17 A. Well, this location this time is a little bit
18 nebulous, because that -- do you mean, like, the five
19 minutes here? Because I'm around a lot of different
20 places in different angles, so, yeah, a few hundred,
21 especially when you have such a great scene. Somewhere
22 around there.

23 Q. Was there anyone else with you when you were
24 taking photographs of this location?

25 A. No.

1 Q. Was there anyone else around when you were
2 taking this photograph?

3 A. No.

4 Q. Do you know if you posted this photograph on
5 social media?

6 A. I believe so.

7 Q. Do you recall which social media account?

8 A. Facebook, and Instagram, and probably Flickr.

9 Q. So recalling the registration was for public --
10 published photos, and you had testified that the photos
11 were published on Facebook, do you -- do you consider
12 Facebook to be a publication?

13 A. Yes.

14 Q. Let's take a look at another document.

15 Do you recognize this document?

16 A. I believe so, yes.

17 Q. Is this the Facebook post you're referring to?

18 A. I believe so.

19 MS. GATES: I'd like to mark this as
20 Defendant's Exhibit 4. It bears the Bates No.
21 McGucken -- or McGucken, my apologies, 2.

22 (Exhibit 4 remotely introduced and marked)

23 BY MS. GATES:

24 Q. Did you edit this photo before posting it on
25 Facebook?

1 A. Yes.

2 Q. Why did you post it on Facebook?

3 A. To build my brand.

4 Q. And you had testified that you considered
5 Facebook to be a publication. Why is that?

6 MS. ZAHARIA: Objection. Seeking legal
7 conclusion.

8 BY MS. GATES:

9 Q. You can answer of your general knowledge.

10 MS. ZAHARIA: I'm going to instruct the witness
11 not to answer on the basis of privilege.

12 MS. GATES: Is it a legal conclusion or is it
13 privilege?

14 MS. ZAHARIA: On the basis of privilege. And
15 if he has an independent basis, he can provide it, but
16 it is also a legal conclusion.

17 BY MS. GATES:

18 Q. Without getting into a legal conclusion or
19 anything you may have discussed with your attorney, why
20 do you consider Facebook to be a publication?

21 A. People see the photograph.

22 Q. So what was your specific purpose for posting
23 this photograph on Facebook?

24 A. To build my fine art brand.

25 Q. And how do you build your brand?

1 A. By posting great, unique photographs.

2 Q. Posting on Facebook?

3 A. Partly.

4 Q. Do you know if when you post on Facebook,
5 Facebook gets a copy of the photograph?

6 MS. ZAHARIA: Objection. Vague. Seeking legal
7 conclusions. Speculation.

8 BY MS. GATES:

9 Q. Without getting into a legal conclusion, do you
10 understand the process of posting on Facebook and
11 whether they get a copy of your photograph?

12 MS. ZAHARIA: Objection. Calls for
13 speculation.

14 BY MS. GATES:

15 Q. You can answer if you understand.

16 A. Yes.

17 Q. Does anyone hire you to take any photos in
18 Death Valley?

19 A. No.

20 Q. In addition to this photograph, did you post
21 any other photographs that you took that day on
22 Facebook?

23 A. Yes.

24 Q. Do you recall how many other photos you posted
25 on Facebook?

1 A. I forget. Maybe around 25 or so.

2 Q. And is this a public Facebook post?

3 MS. ZAHARIA: Objection. Vague.

4 BY MS. GATES:

5 Q. You can answer if you understand.

6 A. People who follow me can see it.

7 Q. Can someone who doesn't follow you see it?

8 MS. ZAHARIA: Objection. Calls for

9 speculation.

10 BY MS. GATES:

11 Q. You can answer if you know.

12 A. If they don't get a notification, I -- I don't
13 know.

14 Q. In posting on social media in order to build
15 your brand, do -- do you know if these postings help
16 with getting job opportunities or selling prints?

17 A. It's -- it's almost hard to tell what will sell
18 and what won't.

19 Q. Do you have any access to data or analytics
20 that would show you how users access your photos?

21 MS. ZAHARIA: Objection. Vague.

22 THE WITNESS: I think Facebook might have. I
23 don't look at that. I think they might have something,
24 but I don't look at it.

25 BY MS. GATES:

1 Q. Do you have access to any data or analytics,
2 for example, for your website?

3 MS. ZAHARIA: Objection. Vague.

4 THE WITNESS: I'm not sure beyond the -- yes,
5 there's some analytics there, but I don't check too
6 often.

7 BY MS. GATES:

8 Q. How often do you check the analytics on the
9 website?

10 A. It may have been months or a year or so. I
11 can't recall.

12 Q. How do you know if your brand is building?

13 MS. ZAHARIA: Objection. Vague.

14 BY MS. GATES:

15 Q. You can answer if you know.

16 A. Art is a nebulous, difficult industry, so it's
17 tough to measure it by the same measurement with which
18 we measure so many other things. But being in the
19 Smithsonian is a good measurement and winning awards is
20 a good measurement and being honored with various
21 installations is a good measurement.

22 Q. When you're referring to the "Smithsonian," are
23 you referring to a specific picture?

24 A. Photographs they'll definitely like.

25 Q. Of the photographs that we just saw on three?

1 A. I'm not sure if that was the same one included
2 there.

3 Q. But it was other photographs that you took that
4 same day at Death Valley?

5 A. I'm not sure if it was that exact, same day.
6 There were a couple of days, but around that time.

7 Q. How many days did you take photographs at Death
8 Valley?

9 A. Around seven. On that trip, the lake was just
10 about two days.

11 Q. So the photos of the Death Valley lake, those
12 were taken over two days?

13 A. I believe so.

14 Q. Do you have any way of measuring financially
15 whether your brand is building?

16 MS. ZAHARIA: Objection. Vague.

17 BY MS. GATES:

18 Q. You can answer.

19 A. Not directly. My artistic heroes never
20 consider their art solely on financial terms, but they
21 ended up creating great financial value by focusing on
22 creating excellent art.

23 Q. So would you say your primary focus is on
24 creating excellent art?

25 A. Yes.

1 Q. I'd like to take a look at another document
2 here.

3 Do you recognize this screenshot?

4 A. Yes.

5 Q. Is this a screenshot of the album you posted in
6 connection with the -- the Death Valley lake photos?

7 A. Yes.

8 MS. GATES: I would like to mark this as
9 Defendant's Exhibit 5.

10 (Exhibit 5 remotely introduced and marked)

11 BY MS. GATES:

12 Q. So how soon, after taking the photos of the
13 Death Valley lake, did you post them on Facebook?

14 A. Well, I see they are taken on March 7th, and
15 they're posted on March 8th.

16 Q. Do you typically post photos on Facebook within
17 a -- a day or so of taking them?

18 A. It all depends on my schedule, but sometimes,
19 yes.

20 Q. And did you edit all these photos before
21 posting them on Facebook?

22 A. Yes.

23 Q. Why did you post these photos in an album on
24 Facebook?

25 A. To share the beauty of the Death Valley lake.

1 Q. So you wanted to share multiple photos rather
2 than one or two photos?

3 A. They capture different moments of different
4 subjects.

5 Q. Do you usually use albums on Facebook to -- to
6 post multiple photos of the same location?

7 A. It varies, but probably more often than not.

8 Q. Did you post these photos anywhere else?

9 A. Some on Instagram, and on Flickr probably most
10 of them.

11 Q. Do you recall how many photos, of these photos,
12 did you post on Instagram?

13 A. I don't know exactly. Maybe five or six.

14 Q. And do you recall how many photos -- of these
15 photos that you posted on Flickr?

16 A. Probably all of them.

17 Q. Would you say that you post more photos on
18 Flickr than you do on Facebook?

19 A. Yes.

20 Q. And would you say that you post more photos on
21 Flickr than you do on Instagram?

22 A. Yes.

23 Q. So looking at the screenshot in the right-hand
24 corner, it says 46 shares. Do you know what that
25 represents?

1 A. How many times the album was shared on
2 Facebook.

3 Q. So did you expect Facebook users to share the
4 images?

5 MS. ZAHARIA: Objection. Vague.

6 THE WITNESS: On Facebook.

7 BY MS. GATES:

8 Q. But not elsewhere?

9 A. No.

10 Q. When you post albums, do people on Facebook
11 often share the album?

12 A. Sometimes.

13 Q. Would you say 46 shares is a typical number?

14 A. Oh, it so varies.

15 Q. Would you say that's a high number or a low
16 number?

17 A. Probably on the higher side.

18 Q. Take a look at another document. Do you
19 recognize this document?

20 A. Yes.

21 Q. What is this document?

22 A. A screenshot of Instagram.

23 Q. Is this your Instagram account?

24 A. Yes.

25 MS. GATES: I'd like to introduce this as

1 Defendant's Exhibit 6. And, for the record, this
2 document is bearing Bates No. NEWS152.

3 (Exhibit 6 remotely introduced and marked)

4 BY MS. GATES:

5 Q. Do you know if this is the same photo or a
6 different photo from the Facebook post we were looking
7 at?

8 A. I think it's the same photo.

9 Q. Is it any different from the photo on Facebook
10 such that it contains edits or modifications?

11 A. I don't believe so. Might be cropped.

12 Q. So you posted this photo on March 13th, 2019?

13 A. Yes.

14 Q. -- is that correct?

15 Do you know why you posted it on March 13th?

16 A. Not specifically.

17 Q. Do you typically post photos on Facebook first
18 and then post something on Instagram?

19 A. Not always but sometimes.

20 Q. Do you know -- do you recall why you were
21 sharing this photo on Instagram in this specific
22 instance?

23 A. To build my brand.

24 Q. Was this a public Instagram post?

25 MS. ZAHARIA: Objection. Vague.

1 BY MS. GATES:

2 Q. You can answer.

3 A. I'm not sure exactly what you mean, but I think
4 so.

5 Q. Was this photo publicly accessible on
6 Instagram?

7 MS. ZAHARIA: Objection. Vague.

8 THE WITNESS: I'm not sure, but I believe it
9 was.

10 BY MS. GATES:

11 Q. Did you place any requirements or restrictions
12 on the use of the photograph in this post?

13 MS. ZAHARIA: Objection. Vague.

14 THE WITNESS: It has my name on it, beside it.

15 BY MS. GATES:

16 Q. Is that a requirement or a restriction?

17 A. I believe the Constitution states that I have
18 full control of my images.

19 Q. Did you post any other photographs similar to
20 this on Instagram?

21 A. I believe I have.

22 Q. When you're referring to the "Constitution"
23 before, do you have a specific section in mind?

24 MS. ZAHARIA: Objection. Calls for a legal
25 conclusion.

1 BY MS. GATES:

2 Q. To the extent you know.

3 A. Yeah. I'm no expert, but it's the part of the
4 Constitution that gives creators rights to the work they
5 create.

6 Q. Have you read the Constitution?

7 A. Yes.

8 Q. In its entirety?

9 A. Yes.

10 Q. When did you read the Constitution?

11 A. Over the years. I'm no expert, but I made my
12 best pass at reading it.

13 Q. Have you read the Constitution recently?

14 A. Has it changed? No. I don't believe I've read
15 it too recently.

16 Q. Do you recall the last time you read it?

17 A. Maybe, like, five or six years ago in its
18 entirety.

19 Q. I'd like to take a look at another document.

20 Do you recognize this screenshot?

21 A. Yes.

22 Q. Is this an album that you posted on your
23 website?

24 A. Yes, it is.

25 MS. GATES: I'd like to introduce this as

1 Defendant's Exhibit 7.

2 (Exhibit 7 remotely introduced and marked)

3 BY MS. GATES:

4 Q. Do you recall when you posted these photographs
5 on your website?

6 A. I don't recall exactly. Around -- around that
7 time, the 10th of March maybe. I don't recall that.

8 Q. And did you edit or modify any of these images
9 before posting them on your website?

10 A. Yes. Some of them are multishot panoramas
11 which require the stitching together of the multiple
12 photographs for super a high res image.

13 Q. What is a "multishot panorama"?

14 A. It's when you take 15 -- 10, 15, 20 shots.
15 Because the Panamint Range, I believe, is 50 miles long,
16 so you're trying to capture the whole span. And then
17 you stitch those images together in either Lightroom or
18 Photoshop for one final image.

19 Q. So those images are a high-resolution version;
20 correct?

21 A. Yes.

22 Q. Are all of these images that are seen here in
23 the screenshot high-resolution images?

24 A. I believe so. This screenshot doesn't show the
25 full resolution, though.

1 Q. What do you mean by that?

2 A. These are thumbnails.

3 Q. So in order to see the full-resolution image,
4 would you need to click on the thumbnail image?

5 A. I believe so, yes.

6 Q. Do you recall why you posted these images on
7 your website?

8 A. To share the beauty.

9 Q. Do you typically post full-size images on your
10 website?

11 A. It depends on the website, but often, yes.

12 Q. For this website, do you typically post
13 full-size images?

14 A. I believe so.

15 Q. Let's take a look at another screenshot.

16 Do you recognize this screenshot?

17 A. Yes.

18 Q. What is this screenshot?

19 A. It's of the Death Valley lake.

20 Q. Is this one of the full-size images from the
21 album of images that were just looking at in Exhibit 7?

22 A. I think there's a higher res version of this
23 that's bigger.

24 Q. That's available on your website?

25 A. I believe so.

1 MS. GATES: I'd like to introduce this as
2 Defendant's Exhibit 8.

3 (Exhibit 8 remotely introduced and marked)

4 BY MS. GATES:

5 Q. Can you describe this information on the
6 left-hand side of the screenshot?

7 A. Yes. That information says "Copyright Elliot
8 McGucken 45Surf 45Epic." And it gives various details
9 of the camera and lenses and settings that were used for
10 the image.

11 Q. Where does this information come?

12 A. I believe it's the EXIF information that's
13 embedded in the photograph.

14 Q. So would the information come from your camera
15 or software program?

16 A. Comes from the camera some of it, and then some
17 of it comes from the software program.

18 Q. So I can Zoom in here if you need to see it
19 more clearly, but I believe it's one, two, three, four,
20 five, six, seven -- eight lines down it says "Date
21 taken."

22 Are you able to see that image, or do you need
23 me to zoom in?

24 A. I believe the camera, that's 2017 or something?

25 Q. Yes.

1 A. I believe that's a camera slot, and it wasn't
2 set.

3 Q. What do you mean it was not set?

4 A. I didn't -- I don't know -- it doesn't seem
5 like it was set properly.

6 Q. Do you typically have to set your camera to
7 include a specific date?

8 A. Yeah. Just generally when a camera -- some of
9 them have the clock right, some of them don't. Some of
10 them you need to. Sometimes the clock resets if there's
11 a sudden change of battery or the power dies, so I can't
12 recall anything about this clock.

13 Q. Do you use the same camera, or do you have
14 multiple cameras?

15 A. I have multiple cameras.

16 Q. And looking down at the bottom here, the second
17 to last line, it says "date modified."

18 Can you read that?

19 A. "2019," dash, "03/08." Yeah.

20 Q. Do you know why it says that date?

21 A. I think that's Lightroom putting the date that
22 it was edited in Lightroom.

23 Q. So March 8th, 2019, is when you edited this
24 photo?

25 A. If the clock was right on my computer. But,

1 yeah, that comes from Lightroom.

2 Q. Does some of this information come from the
3 camera and some comes from Lightroom?

4 A. Yes.

5 Q. Would you characterize this information as
6 metadata?

7 A. Yeah.

8 Q. So what is it that you do with photographs in
9 the Lightroom program?

10 A. You edit them.

11 Q. Can you elaborate a bit more about editing
12 photos in Lightroom?

13 A. Yes. High-end photography, you want to capture
14 a raw file, and the raw file contains all of the
15 information of all the different colors and the lights
16 and darks, so it's very dull and grayish. Then when you
17 edit in Lightroom, you bring out the colors, and the
18 sharpness, and the saturation, and the tones, and the
19 highlights and shadows. So all that information is
20 there. That's why you buy an expensive camera. And
21 you're free to develop it as you see fit and to bend and
22 twist the light so as to bring both the way it was and
23 the way you saw it was to life.

24 Q. So how long does it take you to typically edit
25 a photo in Lightroom?

1 A. It depends. Maybe a panoramic can take 10, 15,
2 20 minutes. Your first pass -- the first photo you look
3 at, you're going to make a lot of adjustments, maybe
4 about a dozen of them. And then once you have that
5 right, you can copy and paste on the other photos, so
6 sometimes some photos can take less time. But maybe
7 about 10, 15 minutes. You have to clean it up to
8 inspect for dust and everything. So around that time.
9 It varies --

10 Q. And --

11 A. It varies wide, very wide.

12 Q. And when you say "copy and paste," were you
13 referring to editing settings?

14 A. Yeah, editing settings.

15 Q. So you can edit one photo and then use the same
16 settings for other photos in the same group?

17 A. Some basic settings would still match up, but
18 you still have to change a lot, but it gets you there
19 closer.

20 MS. GATES: Now may actually be a good time to
21 break for lunch.

22 THE WITNESS: Okay.

23 MS. GATES: How long would you need for lunch?

24 THE WITNESS: I'm fine with anything.

25 MS. GATES: Should we say 30 minutes? Is that

1 too short?

2 THE WITNESS: That works. Up to Laura.

3 MS. ZAHARIA: Let's take 40 minutes.

4 MS. GATES: 40 minutes?

5 THE WITNESS: Okay.

6 MS. GATES: Okay. So it's 3:13 now, so we'll
7 put 40 minutes on the clock.

8 THE WITNESS: All right. Thank you.

9 MS. GATES: Thank you.

10 * * *

11 (LUNCHEON RECESS)

12 * * *

13 BY MS. GATES:

14 Q. So regarding those photographs we looked at
15 today, aside from posting those on your website and
16 social media, did you allow anyone else to use those
17 photographs?

18 MS. ZAHARIA: Objection. Vague.

19 BY MS. GATES:

20 Q. You can answer.

21 A. I believe in -- the document shares who else
22 was able to use the photographs.

23 Q. Do you recall any of those people or entities
24 specifically?

25 A. Yes. SFGate and some others.

1 Q. Okay. Let's take a look at a document. Do you
2 recognize this document?

3 A. Yes.

4 Q. What is it?

5 A. Correspondence with SFGate regarding use of the
6 photo.

7 MS. GATES: I would like to introduce this
8 document bearing Bates No. MCGUCKEN79, I believe it's
9 through 80, as Defendant's Exhibit 9.

10 (Exhibit 9 remotely introduced and marked)

11 BY MS. GATES:

12 Q. So what is "SFGate"?

13 A. It's a newspaper.

14 Q. Is it a print newspaper or an online newspaper?

15 A. It's at least online. It may also be print.

16 Q. Do you recall how SFGate got in contact with
17 you regarding the photo?

18 A. Yes, in the e-mail shown.

19 Q. Do you know where they saw your images in the
20 first place?

21 MS. ZAHARIA: Objection. Calls for
22 speculation.

23 THE WITNESS: I don't recall.

24 BY MS. GATES:

25 Q. Do you recall how many of the photos you

1 permitted SFGate to use?

2 A. I don't recall.

3 Q. Did you require SFGate to pay a license fee for
4 any of the photos?

5 A. No.

6 Q. Why not?

7 A. It was good for my brand.

8 Q. So because it was good for your brand, you
9 allowed SFGate to uses the photos for free?

10 A. Yes. They put effort into an article, and it
11 was good for my brand.

12 Q. What do you mean about "put effort into an
13 article"?

14 A. They interviewed me and got the story.

15 Q. So did you have a phone conversation separate
16 from the e-mail chain?

17 A. I believe so.

18 Q. And when you say it was good for your brand,
19 what do you mean by "good"?

20 A. It portrayed artistic value of my work in a
21 positive light.

22 Q. When you had the phone conversation, did you
23 speak with Amy Graff or someone else?

24 A. I believe it was Amy.

25 Q. Had you met or spoken with Amy before?

1 A. I had not.

2 Q. Had you ever worked with SFGate before?

3 A. I don't believe so.

4 Q. And when SFGate used your photos for free, did
5 you require SFGate to provide a credit or attribution?

6 A. Yes.

7 Q. Did you require SFGate to provide a link to
8 your website or your social media account?

9 A. I believe so.

10 Q. Do you think the credit or the link was more
11 important than a license fee in this instance?

12 A. That's somewhat nebulous. I'm not absolutely
13 sure.

14 Q. Let's put it a different way.

15 What was important regarding SFGate using the
16 photos in this instance?

17 A. A story -- telling the story of my work as a
18 fine art photographer.

19 Q. So would you say that using the images in
20 conjunction with the story about you was the most
21 important?

22 MS. ZAHARIA: Objection.

23 BY MS. GATES:

24 Q. You can answer.

25 A. I don't know if it was the most important, but

1 it was important.

2 Q. Did you place any other restriction on your --
3 on that SFGATE's use of the photo?

4 A. Not explicitly, but I trusted them to use them
5 as was discussed.

6 Q. Did you ever provide SFGate with copies of the
7 image file by e-mail?

8 MS. ZAHARIA: Objection. Vague.

9 THE WITNESS: This is the e-mail that I shared
10 with them.

11 BY MS. GATES:

12 Q. Is it the only e-mail correspondence you had
13 with SFGate?

14 A. I believe it encompasses, entails the totality.

15 Q. So in this e-mail, you're sharing URLs to
16 Facebook and to your website; is that correct?

17 A. Yes.

18 Q. How did you expect SFGate would access or
19 download the photos for you?

20 MS. ZAHARIA: Objection. Vague. Calls for
21 speculation.

22 THE WITNESS: I'm not sure. As it's generally
23 done. I'm not sure.

24 BY MS. GATES:

25 Q. So did you ever provide SFGate with an actual

1 image file via transfer or e-mail?

2 MS. ZAHARIA: Objection. Vague.

3 THE WITNESS: Well, the images had to be
4 transferred in order for them to get them.

5 BY MS. GATES:

6 Q. How were the images transferred to SFGate?

7 A. Online.

8 Q. How were the images transferred online to
9 SFGate?

10 MS. ZAHARIA: Objection. Vague.

11 THE WITNESS: Over the Internet.

12 BY MS. GATES:

13 Q. How were the images transferred over the
14 Internet to SFGate?

15 MS. ZAHARIA: Objection.

16 THE WITNESS: By the means described in this
17 e-mail.

18 BY MS. GATES:

19 Q. So is it your testimony that you transferred
20 the image file to SFGate by providing URLs to your
21 Facebook and your website?

22 A. I don't recall fully, but I believe so.

23 Q. And when you spoke with Amy or someone else
24 from SFGate after, what was it that you discussed?

25 A. The basic story that was detailed in SFGate.

1 Q. What do you mean by "the basic story"?

2 A. The story of capturing the fine art images of
3 the lake in Death Valley.

4 Q. So when you spoke with Amy or someone else at
5 SFGate, it was primarily about how you captured the
6 images; is that correct?

7 A. I'm not sure if it was primarily, but it
8 definitely was a huge part of it.

9 Q. Did you discuss anything else during that
10 conversation?

11 A. I don't recall.

12 Q. Would you refer to the images used by SFGate as
13 fine art images?

14 A. Yes.

15 Q. Do you recall if in your conversations with
16 SFGate, you asked images to be called fine art?

17 A. I don't recall.

18 Q. Let's take a look at another document here.

19 Do you recognize this document?

20 A. Yes.

21 Q. What is it?

22 A. It's an image that I shot of the Death Valley
23 lake, a story about the image that I shot at Death
24 Valley lake.

25 Q. Is this the story in that, that SFGate

1 published, regarding the photos?

2 A. Yes.

3 MS. GATES: I would like to introduce this as
4 Defendant's Exhibit 10. We'll use the Bates range from
5 MCGUCKEN3 to 7.

6 (Exhibit 10 remotely introduced and marked)

7 BY MS. GATES:

8 Q. Does this document refresh your recollection
9 about how many images SFGate used?

10 A. Yes.

11 Q. How many images did SFGate use in the article?

12 A. It says image 10 of 30.

13 Q. Is there an image 10 of 30?

14 A. "Image 16 of 30." It was too small.

15 Q. So by that read, does it indicate that SFGate
16 included 30 images in the article?

17 A. It seems to imply that. Yes.

18 Q. Do you know if SFGate posted the images
19 anywhere else aside from this article?

20 A. I'm not --

21 MS. ZAHARIA: Objection. Calls for
22 speculation.

23 THE WITNESS: Not sure.

24 BY MS. GATES:

25 Q. Did you ever discuss with Amy or someone else

1 at SFGate as to how the photos would be used?

2 A. Basically in the e-mail.

3 Q. Did Amy or anyone else from SFGate ask you if
4 the photos could be used on social media?

5 A. I don't believe so.

6 Q. Do you know if any of your photos were used by
7 SFGate on social media?

8 A. I don't know.

9 Q. Do you know if all the images in that article
10 were your images?

11 MS. ZAHARIA: Objection. Vague.

12 THE WITNESS: I believe they were, but I'm not
13 sure.

14 BY MS. GATES:

15 Q. And SFGate has used your images alongside
16 advertising on its website; correct?

17 A. I believe so.

18 Q. Do you think SFGate made any money on the
19 article?

20 MS. ZAHARIA: Objection. Calls for
21 speculation.

22 THE WITNESS: I wouldn't know.

23 BY MS. GATES:

24 Q. Do you ever post advertisements on your own
25 personal website?

1 MS. ZAHARIA: Objection. Vague.

2 BY MS. GATES:

3 Q. You can answer if you know.

4 A. I might have in the past. Not actively.

5 Q. Are you aware of how advertisements work on a
6 website?

7 MS. ZAHARIA: Objection. Vague.

8 THE WITNESS: Not too aware.

9 BY MS. GATES:

10 Q. What are you aware of regarding advertisements
11 on websites?

12 A. I'm no expert, but people pay to advertise.

13 Q. Do you have any other specific knowledge
14 regarding how advertisements work on a website?

15 MS. ZAHARIA: Objection. Vague.

16 THE WITNESS: I'm no expert.

17 BY MS. GATES:

18 Q. Are you aware of whether views on the website
19 may affect advertisements?

20 MS. ZAHARIA: Objection. Vague.

21 THE WITNESS: I imagine it depends.

22 BY MS. GATES:

23 Q. What do you mean "it depends"?

24 A. I don't understand every single case of online
25 advertising.

1 Q. What is the basis of your knowledge of online
2 advertising?

3 A. Minimal.

4 Q. Have you read any materials or books regarding
5 online advertising?

6 A. Not really. Not for a long time.

7 Q. Take a look at another document. I realize
8 this has a large black dot on this page, so I'll scroll
9 down. So do you recognize this document?

10 A. I believe I do.

11 Q. What is it?

12 A. It's an e-mail from the Smithsonian.

13 MS. GATES: All right. I would like to
14 introduce this as Defendant's Exhibit 11. The document
15 bears McGucken Bates No. 48 through 49.

16 (Exhibit 11 remotely introduced and marked)

17 BY MS. KIM:

18 Q. So had you worked with the Smithsonian or
19 smithsonian.com before this e-mail?

20 A. No.

21 Q. Was this the first time the smithsonian.com had
22 ever reached out to you?

23 A. I believe so.

24 Q. Do you know if the Smithsonian used your photos
25 after this correspondence?

1 A. Yes, they did.

2 Q. Do you recall if you required the Smithsonian
3 to pay a licensing fee?

4 A. I didn't.

5 Q. Why not?

6 A. It was a payment to be on the Smithsonian
7 website.

8 Q. What do you mean by "payment"?

9 A. The Smithsonian has a wonderful brand, and it
10 enhanced my brand to be associated with it.

11 Q. Did you think that the association with the
12 Smithsonian was worth more than a license fee in this
13 instance?

14 A. I'm not sure of the exact details, but it seems
15 okay.

16 Q. What do you mean by "okay"?

17 A. It seemed okay, an okay exchange.

18 Q. Do you recall how the Smithsonian used your
19 photos in this instance?

20 A. Online, I believe.

21 Q. Do you recall how many photos the Smithsonian
22 used?

23 A. I don't recall. A few.

24 Q. Did you require the Smithsonian to provide you
25 with credit for attribution?

1 A. That was implicit in the conversation.

2 Q. And did you require the Smithsonian to provide
3 a link to your website or social media?

4 A. I believe that was implicit.

5 Q. What do you mean by "implicit"?

6 A. They're my photos and they are celebrating my
7 name, so it's just natural they link to my website.

8 Q. If they didn't link to your website, would you
9 ask them to do so?

10 A. I don't recall. It depends. I'm not sure.

11 Q. Do you typically assume if someone like the
12 Smithsonian is using your photos, that they would
13 provide credit and a link to your website?

14 A. Yeah, they would definitely provide credit.
15 I'm not aware about negotiating how much or in what
16 form, but my name is the most prominent feature.

17 Q. Do you have any other communications with Megan
18 Gambino or anyone at the Smithsonian regarding the use
19 of your photos in this instance?

20 A. I believe there was a phone interview.

21 Q. What did you discuss over the phone?

22 A. The story of the creation of the fine art
23 images.

24 Q. Did you discuss any restriction on the use of
25 the photos?

1 A. No. It was a mutually trusting relationship, I
2 felt.

3 Q. Did you discuss how the Smithsonian would use
4 the photo?

5 A. I don't recall.

6 Q. Other than the story, do you recall anything
7 else that was discussed during the phone call?

8 A. I don't recall.

9 Q. Do you recognize this document?

10 A. Yes.

11 Q. What is it?

12 A. "Smithsonian Magazine."

13 Q. Is this the article you were referring to?

14 A. Yes.

15 MS. GATES: I'd like to introduce this document
16 as Defendant's Exhibit 12. This bears
17 Bates No. MCGUCKEN50 through 53.

18 (Exhibit 12 remotely introduced and marked)

19 BY MS. GATES:

20 Q. So is this how the Smithsonian used your photo?

21 A. Yes, I believe so.

22 Q. Do you know if the Smithsonian used your photos
23 in any other way separate from this document?

24 A. I'm not aware.

25 Q. Did the Smithsonian also use your photos next

1 to advertising?

2 A. It seems so.

3 Q. Would you also define these images as "fine art
4 images"?

5 A. Yes.

6 Q. What is your definition of a "fine art image"?

7 A. An image that communicates what you were
8 feeling and what you were thinking in your heart and
9 soul when you captured the image.

10 Q. Would you say that definition is personal to
11 you, or is it an industry-held definition?

12 A. Probably other people share it with me, but
13 it's definitely my definition.

14 Q. Do you recognize this document?

15 A. Yes, I do.

16 Q. What is it?

17 A. It's an e-mail from AccuWeather.

18 MS. GATES: All right. I'd like to mark this
19 document as Defendant's Exhibit 13. It bears
20 Bates No. MCGUCKEN64 through 67.

21 (Exhibit 13 remotely introduced and marked)

22 BY MS. GATES:

23 Q. Do you recall what you were offering
24 AccuWeather in this e-mail?

25 A. Yes. To answer their questions and a link to

1 the photos.

2 Q. Were you permitting AccuWeather to use all of
3 your photographs for free?

4 A. Yes, the photographs that I linked to.

5 Q. And the link that you refer to, is that
6 Facebook or your website?

7 A. That is -- well, one of them was Facebook, and
8 one of them is my website.

9 Q. Do you know how many photos AccuWeather used?

10 A. I forget the details.

11 Q. And did you allow AccuWeather to use your
12 photographs for free?

13 A. Yes, but with credit.

14 Q. Would you characterize AccuWeather as a "fine
15 arts site"?

16 A. With my images on it, yes.

17 Q. Why did you not charge a license fee in this
18 instance?

19 A. I believe he offered a phone interview, and the
20 story behind the creation of my fine art adds value to
21 my brand.

22 Q. So because AccuWeather offered a phone
23 interview, you were willing to allow them to use your
24 photographs for free?

25 A. Because they offered to write a story about the

1 creation of my fine art, I felt that that was enhancing
2 my brand, so I agreed.

3 Q. What did you mean here on the top of the second
4 page where it says, "The original sizes may be enjoyed
5 here"?

6 A. Those are larger than the Facebook.

7 Q. Do you recall if you ever provided the image
8 files directly to AccuWeather?

9 A. I don't recall.

10 Q. When you provided the link to Facebook in your
11 website, did you expect AccuWeather would access and
12 download the photos from those links?

13 A. I believe so.

14 Q. And when you wrote "Here are some new photos of
15 the flood too which haven't been shared yet," what were
16 you referring to?

17 A. I may have finished more additional
18 photographs.

19 Q. What did you mean by they "haven't been shared
20 yet"?

21 A. It's March 12th for this? I guess they might
22 have not been shared in the first batch, so they are
23 photos that I finished more recent.

24 Q. But you had provided a link to Facebook. So
25 had you shared them on Facebook?

1 A. Yes, I believe I shared them on Facebook.

2 Q. When you sent the URL to Brian of AccuWeather,
3 did you warn or caution him not to share the images?

4 MS. ZAHARIA: Objection. Vague.

5 BY MS. GATES:

6 Q. You can answer.

7 A. I think he was going to share them on the
8 AccuWeather story.

9 Q. Did you place any other restrictions on use?

10 A. I don't believe I did.

11 Q. Did you speak with Brian or someone at
12 AccuWeather separately from this e-mail chain?

13 A. I believe I spoke with Brian on the phone.

14 Q. What is the YouTube video that is referred to
15 in this document?

16 A. It's a video of the Death Valley with my brand
17 on it.

18 Q. What do you mean by "brand"?

19 A. 45EPIC.

20 Q. Are you referring to the eagle that's depicted
21 on the video?

22 A. Yes. It says "45EPIC" on the eagle.

23 Q. Is that your logo?

24 A. Yes.

25 Q. So when you say in the e-mail, "Here's a video

1 with both stills and video of the lake," are you
2 referring to still photograph?

3 A. I believe so.

4 Q. So you shot both photographs and a video of the
5 lake?

6 A. Yes.

7 Q. Are any of the photographs you previously
8 looked at today encompassed in this video?

9 A. They might be.

10 Q. How do you choose which still photographs to
11 include in a video for YouTube?

12 A. I forget exactly, but it might have been photos
13 that matched up to the video.

14 Q. What do you mean by "matched up"?

15 A. Photographs that showed similar areas depicted
16 in the video.

17 Q. Do you recall how long the video was?

18 A. Oh, I forget. Maybe a minute, or two minutes,
19 or maybe three minutes. I totally forget.

20 Q. Do you typically create videos in conjunction
21 with your shoot?

22 A. I do, but I don't finish or post them.

23 Q. How often do you post videos to YouTube?

24 A. Not too often. Recently some drone videos, but
25 not too often at all.

1 Q. With this e-mail, were you permitting Brian and
2 AccuWeather to use this YouTube video?

3 A. Yes.

4 Q. Did you send the video file directly to Brian
5 or AccuWeather?

6 A. I don't know. I don't think so. I think they
7 got it off YouTube.

8 Q. How -- do you know how they would get it off
9 YouTube?

10 MS. ZAHARIA: Objection. Calls for
11 speculation.

12 THE WITNESS: Yeah. I don't know if I sent it
13 or if they just got it off YouTube. I totally forget
14 how they got it.

15 BY MS. GATES:

16 Q. Do you know what syndicated news coverage is?

17 MS. ZAHARIA: Objection. Vague.

18 THE WITNESS: I am no expert in the news
19 industry, but I believe it means "syndicated."

20 BY MS. GATES:

21 Q. What does "syndicated" mean?

22 A. "Distributed."

23 Q. Do you know what Brian was referring to in this
24 e-mail when he talks about syndicated news coverage?

25 MS. ZAHARIA: Objection. Calls for

1 speculation.

2 THE WITNESS: Not directly.

3 BY MS. GATES:

4 Q. So when Brian asked, "Can we use your video for
5 our syndicated news coverage as well" and you replied,
6 "sure," was that permission to allow syndicate --
7 syndication of the YouTube video?

8 A. I believe so.

9 Q. Did you charge a syndication or a license fee?

10 A. I did not.

11 Q. Why not?

12 A. I felt that getting my name out there with this
13 particular story attached would be a wonderful way to
14 communicate the value and characterize the value of my
15 fine art photography.

16 Q. So what was your understanding of how the video
17 would be distributed?

18 A. I believe that people would see it, and my name
19 would be on it and associated with it with credit to me,
20 and that was my understanding.

21 Q. When you say "people would see it," are you
22 referring to the video on YouTube, or are you saying the
23 video would be seen elsewhere on other platforms?

24 A. I believe -- I'm not sure, exactly. I just
25 believed it would be shown with my name on it to various

1 people.

2 Q. Have you ever used a video from YouTube on one
3 of your websites?

4 A. I believe I might have.

5 Q. Do you recall how you used the video on your
6 website?

7 A. Yeah. I put it on the website.

8 Q. Do you recall how you put it on the website?

9 A. They provide a way for you to link the video on
10 the website.

11 Q. When you say "they," who are you referring to?

12 A. YouTube.

13 Q. So YouTube provides you with a way to link to a
14 video on a website; is that correct?

15 A. Yes.

16 Q. Do you recall how YouTube provides you with the
17 way to do this?

18 A. Yes. They have a link option.

19 Q. So have you ever used a video from YouTube
20 personally?

21 A. I believe I have.

22 Q. So how would you go through the process of
23 doing that?

24 A. You copy the code and put it on your website.

25 Q. When you say, "Put it on your website," what do

1 you mean?

2 A. You put the code on your website.

3 Q. When you say, "Put the code on your website,"
4 what do you mean?

5 A. You take the code to link to the video, put it
6 on your website, and that links the video.

7 Q. When you say, "Put it on your website," where
8 do you put it?

9 A. In the HTML code.

10 Q. So the code that YouTube provides, is it also
11 an HTML code?

12 A. They provide various options.

13 Q. When you've done this before, which option do
14 you select?

15 A. I forget details, but I'm not sure if it's just
16 a link or the HTML. I'm not sure.

17 Q. When you used a video from YouTube on your
18 website, is it your own YouTube video or someone else's
19 YouTube video?

20 A. I believe that I've used my own. I might have
21 used somebody else's, but I can't recall.

22 Q. How does the YouTube video appear on your
23 website when you've done it?

24 A. I think it depends on the browser.

25 Q. Which browser do you usually use?

1 A. Chrome.

2 Q. How does it appear in Chrome?

3 A. It appears as the video.

4 Q. When you say "as the video," what do you mean?

5 A. You can watch the video.

6 Q. Does the video refer back to YouTube?

7 A. Yes.

8 Q. If you were to watch the video on your website,

9 are you watching the video on YouTube?

10 A. Yes. Maybe -- I believe so.

11 Q. Do you recognize this document?

12 A. I do.

13 Q. What is it?

14 A. It is an article concerning my fine art

15 photography.

16 Q. Is this an article on accuweather.com?

17 A. Yes.

18 Q. Is this the article that you spoke with Brian

19 of AccuWeather about?

20 A. Yes.

21 MS. GATES: Okay. I would like to introduce

22 this document as Defendant's Exhibit 14.

23 (Exhibit 14 remotely introduced and marked)

24 BY MS. GATES:

25 Q. Is this how AccuWeather used your photo?

1 A. Yes, I believe so.

2 Q. Do you recall how many photos AccuWeather used?

3 A. It seems 16.

4 Q. And did AccuWeather provide a link to your
5 website or social media?

6 A. I believe so.

7 Q. Is the photo on this page one of your photos?

8 A. That is not my photograph.

9 Q. What photograph is it?

10 A. It says "Photos from the National Parks
11 Service."

12 Q. Did AccuWeather also use your photos alongside
13 advertising on its website?

14 A. It appears so, yes.

15 Q. Do you recognize this document?

16 A. Yes.

17 Q. What is it?

18 A. It's an e-mail requesting the use of my
19 photographs.

20 Q. An e-mail from whom?

21 A. Yasemin of "Live Science."

22 MS. GATES: All right. I would like to
23 introduce this e-mail MCGUCKEN70 through 78 as
24 Defendant's Exhibit 15.

25 (Exhibit 15 remotely introduced and marked)

1 BY MS. GATES:

2 Q. Do you know Yasemin?

3 A. I don't.

4 Q. Had you worked with "Live Science" before?

5 A. I have not -- I don't believe I have.

6 Q. Do you recall if you ever signed a photo
7 agreement in connection with this e-mail request?

8 A. I can't recall. I might have, but I can't
9 recall.

10 Q. On the top of this page, it looks like Yasemin
11 is writing, "I will send along our photo agreement." Do
12 you know if she ever did that?

13 A. I can't recall. Maybe she did. I cannot
14 recall at all.

15 Q. Would you typically sign a photo agreement for
16 the use of your photo in instances like this?

17 A. It totally goes by a case-by-case basis.

18 Q. Would you request a photo agreement, or would
19 it be the other side that would request a photo
20 agreement?

21 A. It -- it -- it varies case by case.

22 Q. Do you have your own photo agreement that you
23 use in instances like this?

24 A. I've created invoices, I believe.

25 Q. So would the invoice serve as the agreement?

1 A. I don't believe it did in this case.

2 Q. Do you recall if you've provided the image
3 files directly to "Live Science"?

4 A. I totally forget how they got those. They
5 might have -- there may be a link to the Facebook.

6 Q. So if you provided links to the Facebook in
7 your website, would you not have provided the image
8 files directly to "Live Science"?

9 A. I'm not sure if -- I'm not sure if I provide it
10 directly, but it looks like this was what I sent them.

11 Q. Do you recall if you required "Live Science" to
12 pay a license fee?

13 A. I don't believe so.

14 Q. Why not?

15 A. I forget details, but I believe I enjoyed the
16 website. I do remember checking it out, and I enjoyed
17 the spirit of it, so...

18 Q. In your typical practice, would you not require
19 someone to pay a license fee if you enjoyed the website?

20 A. It all depends case by case.

21 Q. Do you think credit was more important than the
22 license fee in this instance?

23 A. At the time that I made this agreement, I
24 thought it was worth- -- worthwhile.

25 Q. When you're deciding between requiring credit

1 or requiring a license fee, what types of factors do you
2 consider?

3 A. Numerous. How it reached out to you, how it
4 tells the story regarding my fine art photography, how
5 it presents my work. Numerous. Again, case by case, so
6 a lot, but different things can be taken into
7 consideration.

8 Q. Do you ever discuss how your photos are going
9 to be used before you approve for use?

10 MS. ZAHARIA: Objection. Vague.

11 THE WITNESS: A little bit. We -- I mean, in
12 life, a lot of life's a dance where you basically have
13 trust.

14 BY MS. GATES:

15 Q. Are there any other factors you consider in
16 deciding whether to ask for credit or require a license
17 fee?

18 A. It all varies. The -- how I'm approached as an
19 artist and photographer and how my work's used. It's
20 many different factors like that.

21 Q. Do you know how many photos "Live Science" used
22 in this instance?

23 A. I don't recall.

24 Q. Do you know how they used the photos?

25 A. I don't recall specifically.

1 Q. Do you typically keep track of how entities or
2 people use your photos?

3 A. I love hearing the stories.

4 Q. Do you save the stories or have any other
5 recordkeeping of the uses of your photos?

6 A. The e-mails are usually searchable, so those
7 are a record.

8 Q. Do you recall if you placed any restrictions on
9 Live Science's use of your photos in this instance?

10 A. I don't recall anything beyond these e-mails.

11 Q. Did you speak with Yasemin or anyone else from
12 "Live Science" separate from these e-mails?

13 A. I don't recall, but she did credit them with
14 Elliot McGucken Fine Art.

15 Q. When you ask for credit, do you typically ask
16 for just your name or your name plus the term "fine
17 art"?

18 A. It varies, but would I be guaranteed a credit
19 on all of my fine art photography with Elliot McGucken
20 Fine Art. So yeah, in this case, I made sure to put
21 that in.

22 Q. In this instance when Yasemin is writing, "We
23 had published it yesterday and linked to your Facebook,"
24 do you know personally what she was referring to?

25 A. I don't.

1 Q. Do you recognize this document?

2 A. Yes.

3 Q. What is it?

4 A. It is the "Live Science" article.

5 Q. The same "Live Science" article we were
6 discussing --

7 A. Yes.

8 Q. -- just a moment ago?

9 A. Yes.

10 MS. GATES: All right. We would like to
11 introduce this as Defendant's Exhibit 16.

12 (Exhibit 16 remotely introduced and marked)

13 BY MS. GATES:

14 Q. Is this how "Live Science" used your
15 photograph?

16 A. I believe so, yes.

17 Q. And do you recall if there were links to your
18 website or social media?

19 A. I do not recall, but they did credit Elliot
20 McGucken Fine Art.

21 Q. Did "Live Science" ask for any quotes or
22 anymore information regarding the story?

23 A. In those e-mails, I believe that was the extent
24 of our conversation.

25 Q. Do you have any -- did you have any concerns at

1 the time because they did not ask for more information
2 about the creation of the photograph?

3 MS. ZAHARIA: Objection. Vague.

4 THE WITNESS: Yeah, I believe they did, I mean,
5 we had a conversation, and the author said she found my
6 photos to be beautiful. So when somebody says that they
7 find your work to be beautiful, that definitely bolsters
8 the fine art aspects of it, so then you get a little bit
9 of faith that they're going to treat your work in a fine
10 art manner, which they did.

11 BY MS. GATES:

12 Q. So you're more concerned about the treatment of
13 the photograph rather than them -- "Live Science" asking
14 for more information about the -- the specifics behind
15 the photograph, you know, the lake and the location?

16 A. Yeah, they told the story well and presented my
17 work as fine art photography, so I was content.

18 Q. If you weren't content with how the photos were
19 presented, would you have done anything or taken any
20 action?

21 MS. ZAHARIA: Objection. Vague.

22 THE WITNESS: Yes. It's -- that's really
23 speculative. Of course if somebody does something I
24 don't like, I would let them know.

25 BY MS. GATES:

1 Q. How would you let them know?

2 A. By e-mail probably.

3 Q. Would you ask them to remove the photograph if
4 you didn't like how it was presented?

5 A. That's so speculative. I am not sure.

6 Q. Are there ever -- have there ever been any
7 instances in which you permitted someone to use a
8 photograph but then ask that they take it down because
9 you didn't like the use?

10 A. I can't recall offhand.

11 Q. And did "Live Science" use your photograph
12 alongside advertisements?

13 A. I believe they did.

14 Q. Was that a concern for you?

15 MS. ZAHARIA: Objection. Vague.

16 THE WITNESS: Not a huge concern.

17 BY MS. GATES:

18 Q. Was it a minor concern?

19 A. I didn't think about it. They were treating my
20 work as fine art and presenting it to a scientific
21 audience. As my background in physics and I do fine art
22 photography, I felt the use appropriate.

23 BY MS. GATES:

24 Q. Other than the credit, do you recall if "Live
25 Science" referred to your images as fine art in the

1 article?

2 A. I forget. I would have to review the article,
3 but yeah, the captions of an article are part of the
4 article.

5 Q. Do you recognize this document?

6 A. Yes.

7 Q. What is it?

8 A. It's correspondence with the editor of
9 PetaPixel regarding a story about my fine art.

10 MS. GATES: All right. We would like to
11 introduce this article bearing Bates No. MCGUCKEN81
12 through 83 as Defendant's Exhibit 17.

13 (Exhibit 17 remotely introduced and marked)

14 BY MS. GATES:

15 Q. Do you recall if PetaPixel reached out to you
16 or if you reached out to them?

17 A. I believe I reached out to them.

18 Q. And why did you reach out to PetaPixel?

19 A. It is one of my favorite photography websites,
20 and it might be the biggest photography website, and it
21 is definitely somewhere to celebrate your fine art.

22 Q. Have you worked with PetaPixel in the past?

23 A. I believe I've written one or two articles.
24 Maybe one, maybe two.

25 Q. When you say "written article," are you

1 referring to, you know, something lengthy or something
2 shorter such as captions?

3 A. Relative -- I did an article concerning the
4 golden ratio in Ansel Adams' photography. I remember
5 doing that with them.

6 Q. Did PetaPixel reach out to you first, or did
7 you offer to write that article?

8 A. I believe I pitched it to them. I reached out
9 to them.

10 Q. Did they compensate you for the article?

11 A. No. Not in monetary, but to be published on
12 PetaPixel and I was selling a book on the golden ratio,
13 so...

14 Q. So in that instance, you wanted to be published
15 in PetaPixel for promotional purposes?

16 A. Yes.

17 Q. Do you know Michael Zhang personally?

18 A. I don't, but I corresponded with him, I
19 believe, on the golden ratio article.

20 Q. Do you know what his role is at PetaPixel?

21 A. I believe he's one of the founders, and I
22 believe that he is, like, the head editor or
23 editor-in-chief or definitely a higher-up editor. I
24 don't know their business structure, but, yeah, he's
25 founder/editor, something like that.

1 Q. Do you recall if you provided the image files
2 directly to PetaPixel?

3 A. I forget exactly if I provided them a link to
4 the files and he chose his favorites or -- it's
5 probably -- I believe all the correspondence was in this
6 e-mail, so what's here is here.

7 Q. So when you provide a link to images, do you
8 allow -- typically allow the editor to choose which
9 images they'll use?

10 A. In this case, I trusted Michael, I loved his
11 website and his work, so...

12 Q. When you worked with other editors at
13 publications, is that your typical practice, to provide
14 a link and allow them to choose images?

15 A. Generally, yes.

16 Q. In this instance, did you expect PetaPixel to
17 download the images from Facebook or your website?

18 A. Most likely.

19 Q. Did you require PetaPixel to pay a license fee?

20 A. I did not.

21 Q. Why not?

22 A. It's -- it's an honor in the photographic
23 community to have your fine art photography displayed on
24 PetaPixel.

25 Q. So because it was an honor, you did not charge

1 a license fee?

2 A. Yes.

3 Q. Did you require PetaPixel to provide you with
4 credit?

5 A. Yes. They wrote the -- I think they wrote
6 it -- posted the article as I wrote it myself.

7 Q. Did you provide a -- separate written documents
8 for the article?

9 A. I believe if you scroll up, you'll see the
10 story that I told, and I believe that Michael took that
11 story with extra statements. My general recollection --
12 it was a couple of years ago, but I believe he took that
13 statement and chose the photos he wanted, and that's how
14 he created the article. That's what I recall.

15 Q. And do you recall if you asked PetaPixel to
16 provide credit to just your name or your name plus the
17 term "fine art"?

18 A. Well, it's a different audience. Like the
19 photographic websites when you're amongst photographers,
20 they recognize fine art when they see it. So most every
21 photographer in that context is going to see it as fine
22 art. So, yeah, I generally like people saying fine art,
23 but when you're in the photographic community, it can be
24 a little bit redundant, so...

25 Q. Do you know how many photos PetaPixel used for

1 this article?

2 A. I forget. Maybe less than a dozen, I would
3 guess maybe between six and 12. I forget.

4 Q. And regarding your distinction of using the
5 term "fine art" for PetaPixel versus other types of
6 publications, what is that understanding based on?

7 A. Just generally that you also want to show a
8 degree of humility amongst your fellow photographers.
9 So many they do fine art. So if they post pictures,
10 it's kind of there's no need to tell them that it's fine
11 art. They understand that, so...

12 Q. Do you know if PetaPixel used the photos
13 anywhere else aside from its website?

14 A. I'm not sure.

15 Q. Did you place any restrictions on the use of
16 the photo?

17 A. No. I've worked with them before, and I
18 trusted them.

19 Q. Aside from this e-mail correspondence, did you
20 speak with Michael or anyone from PetaPixel separately?

21 A. I don't think so. I think this was the full
22 extent of it. I believe so.

23 Q. Do you recognize this document?

24 A. Yes. It is the PetaPixel article.

25 MS. GATES: All right. We would like to

1 introduce this as Defendant's Exhibit 18. There is
2 Bates No. MCGUCKEN44 through 47.

3 (Exhibit 18 remotely introduced and marked)

4 BY MS. GATES:

5 Q. Does this refresh your recollection about how
6 many photos PetaPixel used?

7 A. Yes. It would have been the number displayed
8 here. Is that 10 or 12? I didn't count. Oh,
9 perfectly.

10 Q. You tell me.

11 A. Well, there's four, five -- it looks like a
12 part of one, so six, seven, eight, nine -- nine? I
13 guess nine. It looks like one was cropped.

14 Q. Did you ask PetaPixel to link to your website
15 or social media accounts in this article?

16 A. I believe that my name was in the byline, and
17 that links to my website. Like, I believe there's a
18 link to my website there. I forget.

19 Q. And did PetaPixel display your photograph
20 alongside advertising?

21 A. I believe they did.

22 Q. Was this a -- any concern whether it be major
23 or minor?

24 MS. ZAHARIA: Objection. Vague.

25 THE WITNESS: I don't recall, but not -- not a

1 huge concern. They gave me 100 percent control.

2 BY MS. GATES:

3 Q. What do you mean by "100 percent control"?

4 A. Oh, they used my words for the article.

5 Q. Did they allow you to edit the article before
6 it was posted?

7 A. No, but they pretty much used what I said.

8 Q. Do you recognize this document?

9 A. Yes.

10 Q. What is it?

11 A. It's a letter e-mail from Jonathan Carey at
12 "Atlas Obscura."

13 MS. GATES: All right. We'll introduce this
14 document as Defendant's Exhibit 19. It bears
15 Bates No. MCGUCKEN68.

16 (Exhibit 19 remotely introduced and marked)

17 BY MS. GATES:

18 Q. What is "Atlas Obscura"?

19 A. I believe it's basically somewhat of a news
20 site that's more, like, long-term, and they concentrate
21 on phenomena, physical phenomena or paraphysial
22 phenomena, that's just my general sense.

23 Q. Had you worked with Jonathan Carey or "Atlas
24 Obscura" before this communication?

25 A. No, I don't believe I have.

1 Q. Did Atlas ultimately use your photos in an
2 article?

3 A. I believe they did.

4 Q. Do you recall how many Atlas used?

5 A. I can't recall off the top of my head.

6 Q. Do you recall if you provided the image files
7 to Atlas?

8 A. I don't recall how they got them.

9 Q. Did you have any separate communications with
10 Atlas aside from this e-mail?

11 A. I believe this represents the entirety.

12 Q. Did you speak with anyone by phone at Atlas?

13 A. I forget. I might have, but I forget.

14 Q. Do you know whether Jonathan or someone at
15 Atlas accessed your photos from your website or social
16 media?

17 MS. ZAHARIA: Objection. Calls for
18 speculation.

19 THE WITNESS: Yeah. I'm not sure exactly. It
20 would be in this correspondence most likely.

21 BY MS. GATES:

22 Q. If it's not referenced in the e-mail, how would
23 you expect Atlas to access your photographs?

24 MS. ZAHARIA: Objection. Calls for
25 speculation.

1 THE WITNESS: I'm not sure.

2 BY MS. GATES:

3 Q. Did you charge Atlas a license fee to use your
4 photograph in this instance?

5 A. I don't believe so.

6 Q. Why not?

7 A. I believe I checked out the website, it had a
8 little bit of a scientific bent to it. It had a little
9 bit of a feel of something that was special and rare, so
10 I kind of felt that that aligned with my fine art brand.

11 Q. In deciding whether to grant permission to use
12 your photographs without a license fee, do you typically
13 check out the website beforehand?

14 A. Yes.

15 Q. What do you look for on the website?

16 A. I --

17 MS. ZAHARIA: Objection.

18 THE WITNESS: It varies. It all depends on the
19 website. There's so many variations on websites.

20 BY MS. GATES:

21 Q. Is there anything in particular that you would
22 like to see on the website in order to approve use of
23 the photo for free?

24 A. That's nebulous. I would have to go on a
25 case-by-case basis.

1 Q. Can you provide an example of what you may see
2 on a website that prompts you to want to allow the
3 website to use your photos for free?

4 A. Well, the Smithsonian institution is famous for
5 the realm of both science and the arts, so that's
6 definitely a case of where I would want my photos to
7 appear.

8 Q. So you typically look for websites that are
9 focused on science and the arts?

10 A. Generally speaking. There's so many factors.

11 Q. Would you characterize your images of the Death
12 Valley lake as newsworthy?

13 MS. ZAHARIA: Objection. Seeking legal
14 conclusion.

15 BY MS. GATES:

16 Q. To the extent you understand the term.

17 A. In a "fine art" sense.

18 Q. What about in the -- in the news sense?

19 A. That's up -- I mean, I have no say in what
20 people see as news, but I see them as fine art.

21 Q. Do you have any experience in journalism?

22 A. Not really.

23 Q. But you've written articles for websites like
24 PetaPixel?

25 A. Yes.

1 Q. Have you written any other articles?

2 A. Maybe a couple.

3 Q. What types of articles have you written?

4 A. I don't -- I mean, things on the golden ratio,
5 physics articles for scientific research, so that's
6 probably about it.

7 Q. Would you say that a weather event is a news
8 event?

9 MS. ZAHARIA: Objection.

10 THE WITNESS: I'm no expert, but I think it was
11 a fine art event, in my case.

12 BY MS. GATES:

13 Q. Would you say that a phenomenon is a news
14 event?

15 MS. ZAHARIA: Objection.

16 THE WITNESS: It -- it all depends.

17 BY MS. GATES:

18 Q. Depends on what?

19 A. If it becomes news or not.

20 Q. What do you mean by "if it becomes news or
21 not"?

22 A. I'm no expert on exactly what constitutes news,
23 but yeah, it's difficult to answer.

24 Q. Do you think the interest in this instance was
25 in a news event or in your fine art photos?

1 MS. ZAHARIA: Objection.

2 THE WITNESS: I'm not sure in whose -- whose
3 interest you're talking about. My interest was in the
4 fine art.

5 BY MS. GATES:

6 Q. Let's take "Atlas Obscura," for example. This
7 document states, "I'm currently working on a story about
8 the lake that was created in Death Valley."

9 Based on that statement, do you think, you
10 know, "Atlas Obscura's" interest was in the weather
11 event?

12 MS. ZAHARIA: Objection. Calls for
13 speculation.

14 THE WITNESS: Yeah, I would have to speculate.
15 But generally rare weather events make fine art
16 photography, and we seek those rare moments. And I'd
17 have to add that rare weather events captured with an
18 expertise and a vision that also places your feelings
19 and your interpretations seen upon it.

20 BY MS. GATES:

21 Q. When you captured the photos of the Death
22 Valley lake, would you say that you were documenting an
23 event?

24 MS. ZAHARIA: Objection. Vague.

25 THE WITNESS: No. It's not the rare

1 documentation. It's the position of your vision and
2 your feelings and capturing the world as you perceive it
3 through your own individual set of eyes. Documenting
4 would just be somebody else taking something with their
5 iPhone if it was, but mine was a fine art effort. I was
6 very conscious of that.

7 BY MS. GATES:

8 Q. So do you think there's a difference between
9 taking a photo with an iPhone and taking a photo with
10 a -- a camera such as the one you used?

11 A. Definitely.

12 Q. What is that difference?

13 A. Oh, millions of ways. For one, iPhones of that
14 era didn't shoot raw files.

15 Q. And what is a "raw file"?

16 A. A "raw file" is a file that contains all of the
17 information, a huge file, and then you get to select
18 which information you bring out of it in the processing.

19 Q. Are there any other differences between an
20 image shot with a iPhone and an image shot with a camera
21 like yours?

22 A. The resolution, the quality, the ability to
23 post process and make it into fine art. Yes. It's
24 night and day.

25 Q. Do you think that --

1 MS. ZAHARIA: Counsel, we've been going for
2 over an hour. Do you have an idea of when we should --
3 we'll be able to take a short break?

4 MS. GATES: Yeah. If I can just wrap up this
5 one point, maybe five -- five more minutes.

6 Q. So do you -- do you think that fine art images
7 can be taken with an iPhone?

8 A. It's probably possible, but that's speculation.
9 But I think the superior images that you see in
10 galleries that sell for a lot are not taken with
11 iPhones.

12 Q. Have you ever captured an image with an iPhone?

13 A. Yes.

14 Q. Would you characterize any of the images that
15 you've captured with an iPhone as fine art?

16 A. Probably not.

17 Q. Do you recognize this document?

18 A. Yes.

19 Q. What is it?

20 A. It is the "Atlas Obscura" article pertaining to
21 my image which says "McGucken 45Epic Fine Art Landscape
22 Photography."

23 Q. Do you recall if you provided that credit to
24 Atlas?

25 A. I forget where it came from exactly.

1 MS. GATES: Let's introduce this exhibit as
2 Defendant's Exhibit 20.

3 (Exhibit 20 remotely introduced and marked)

4 BY MS. GATES:

5 Q. Do you know where Atlas would have drawn that
6 credit if you had not provided it?

7 MS. ZAHARIA: Objection. Calls for
8 speculation.

9 THE WITNESS: Yeah. I'm not sure exactly.

10 BY MS. GATES:

11 Q. The name "45Epic Fine Art Landscape
12 Photography," where is that used online?

13 MS. ZAHARIA: Objection. Vague.

14 THE WITNESS: Various places.

15 BY MS. GATES:

16 Q. Which places?

17 A. I believe Facebook, Instagram, my own website,
18 Flickr. Various places.

19 Q. Is this how "Atlas Obscura" used your photos?

20 A. I believe so.

21 Q. And did Atlas use your photos alongside
22 advertisement?

23 A. They did.

24 Q. Was that a concern for you whether major or
25 minor?

1 MS. ZAHARIA: Objection. Vague.

2 THE WITNESS: Probably minor. He says the
3 photographs are dazzling.

4 THE REPORTER: I'm sorry. Can you repeat the
5 end of that statement. "He says the photographs are" --

6 THE WITNESS: So the author, Jonathan Carey,
7 said the photographers are dazzling, which definitely
8 plays into my exalted fine art brand.

9 BY MS. GATES:

10 Q. Where does he say that the photographs are
11 dazzling?

12 A. I think if you scroll to the bottom, and "The
13 results are these dazzling photos which capture a
14 natural wonder that would have remained hidden if not
15 for the photographer and his camera."

16 So yeah, it exalts my fine art and my
17 uniqueness and talent as a photographer.

18 Q. Do you think Atlas' use of the photos in this
19 photograph was also for a news purpose?

20 MS. ZAHARIA: Objection. Calls for a legal
21 conclusion.

22 THE WITNESS: I've never given it thought, but
23 they definitely exalted the nature of my fine art brand,
24 and they saluted it and paid tribute to it, so overall
25 that's a good thing.

1 BY MS. GATES:

2 Q. Would you agree with the statement noted in
3 this last sentence of the document that "the natural
4 wonder would have remained hidden if not captured by the
5 photographer"?

6 MS. ZAHARIA: Objection. Calls for
7 speculation.

8 THE WITNESS: Yeah. There are many
9 interpretations for that, but in this case I feel like I
10 captured the event as fine art photography, which
11 resulted in dazzling photographs.

12 MS. ZAHARIA: All right, Counsel. We're going
13 to take a break now. We're going to go off the record
14 for five minutes.

15 MS. GATES: I have a few questions. I would
16 like to finish this document so I don't have to come
17 back to it.

18 MS. ZAHARIA: We're going to proceed to taking
19 a break now.

20 MS. GATES: How long?

21 MS. ZAHARIA: Five minutes.

22 MS. GATES: Let's keep it to five minutes,
23 please.

24 (Recess)

25 BY MS. GATES:

1 Q. Let's go back to taking a look at this,
2 Exhibit 20. Do you see the sentence here in the exhibit
3 that says, "Luckily, this phenomenon was caught on
4 camera by the photographer?"

5 A. Yes.

6 Q. Do you agree with that characterization?

7 MS. ZAHARIA: Objection. Vague.

8 THE WITNESS: As a fine art photographer, yes.

9 BY MS. GATES:

10 Q. Would you agree that a news photograph can also
11 be fine art?

12 A. I'm no expert. I'm not sure. What do you mean
13 by "fine art"?

14 Q. What do you mean by "fine art"?

15 A. I think I've already answered that question.

16 Q. So under your definition of fine art, would you
17 agree that news photographs can also be fine art?

18 A. But I don't know what you mean by "fine art,"
19 so if I give my answer, I'm not sure if you'll
20 understand it in the way that I intend. What do you
21 mean by "fine art"?

22 Q. I would like to use your definition of "fine
23 art."

24 A. And what was that?

25 Q. So in the context of my question, using your

1 definition of "fine art," would you agree that news
2 photographs can also be fine art?

3 A. In this case, the results are these dazzling
4 photographs which capture a natural wonder, so my
5 photographs are fine art.

6 Q. Are your photographs also news photographs?

7 MS. ZAHARIA: Objection. Vague.

8 THE WITNESS: What do you mean by "news
9 photographs"?

10 BY MS. GATES:

11 Q. Are your photographs images of a -- a news
12 event?

13 MS. ZAHARIA: Objection. Vague. Seeking legal
14 conclusion.

15 THE WITNESS: They're fine art photographs of
16 something that occurred.

17 BY MS. GATES:

18 Q. Do you think that something that occurred would
19 be of interest to the public?

20 MS. ZAHARIA: Objection. Vague. Calls for
21 speculation.

22 THE WITNESS: Without my dazzling photographs,
23 which are the subject of this article, I don't know if
24 they'd be of interest.

25 BY MS. GATES:

1 Q. Would you agree that your photographs, in this
2 instance, capture phenomenon?

3 MS. ZAHARIA: Objection. Vague.

4 THE WITNESS: My fine art photographs capture
5 fine art of the phenomenon.

6 BY MS. GATES:

7 Q. But do your photographs capture a lake?

8 MS. ZAHARIA: Objection. Vague.

9 THE WITNESS: My photographs captured the fine
10 art realizations of the lake which, as the article
11 states, results in dazzling photos.

12 BY MS. GATES:

13 Q. Does your photograph depict a lake?

14 MS. ZAHARIA: Objection. Vague.

15 THE WITNESS: My fine art photographs depicted
16 a fine art impressions of a lake.

17 BY MS. GATES:

18 Q. Was the subject of your photographs a lake?

19 MS. ZAHARIA: Objection. Vague.

20 THE WITNESS: Well, the subject of my
21 photographs are also what I imbued them with. So
22 they're fine art photographs. So there's a lake in
23 them, and also there's my fine art interpretation of the
24 lake.

25 BY MS. GATES:

1 Q. What is your fine art interpretation of the
2 lake?

3 A. As stated before, I photographed the way that
4 the lake felt to me and the feeling. So my photographs
5 communicated and expressed the depth of feeling that I
6 was experiencing witnessing the lake in a fine art
7 manner.

8 Q. Do you know if the lake disappeared after you
9 photographed it?

10 MS. ZAHARIA: Objection. Calls for
11 speculation.

12 THE WITNESS: I imagine it did. I wasn't there
13 to document it.

14 BY MS. GATES:

15 Q. How would you identify the feeling you
16 described in your photographs?

17 A. Well, it's an epic mythological biblical
18 feeling. Of course Noah's flood is a great epic story
19 that contains a lot of mutes, so I saw elements of that.
20 One of my favorite novels is "Moby-Dick," which
21 celebrates the vastness of the ocean and the sea, so
22 there are elements of that. Another favorite book is
23 Edward Abbey's "Desert Solitaire" where he compares the
24 contrast the desert to the ocean, so I was feeling
25 elements of that, the juxtaposition of the ocean and the

1 desert.

2 Q. Your credit "45Epic," what does that mean?

3 A. "45" comes from the .45 revolver in my favorite
4 Sergio Leone film, "A Fistful of Dollars," and Sergio
5 Leone credited Homer, the greatest poet and author of
6 "The Iliad" and "Odyssey" as being the foundational and
7 preeminent author of the western. Sergio Leone, you
8 know, is probably credited as the greatest -- one of the
9 greatest directors ever, making Clint Eastwood the star,
10 inspiring Quentin Tarantino. So that .45 carried with
11 it mythological aspects and artistic view with which I
12 shoot everything: The .45 revolver. And "Epic," of
13 course, is just a simple salute to what it says: Epic
14 poetry.

15 Q. Going back to Exhibit 17, do you recall sending
16 this e-mail to nps.gov?

17 A. I believe so.

18 Q. What was the purpose for sending this e-mail to
19 nps.gov?

20 A. I believe I was wondering how big the lake was.

21 Q. And what is nps.gov?

22 A. "National Park Service."

23 Q. Why were you seeking information about the size
24 of the lake?

25 A. Because I was fascinated. I had never seen a

1 body of water that big, and it turns out the ranger who
2 saw it the next day, I think, hadn't seen one like that
3 either.

4 Q. So would you say that, that lake was rare?

5 A. I believe so in one context. In another
6 context, that all used to be a lake.

7 Q. Was the size of the lake interesting?

8 MS. ZAHARIA: Objection. Vague.

9 THE WITNESS: Well, the way that I was able to
10 capture it in my photos that it displayed the vast
11 expanse using my expertise as a photographer, it was of
12 interest. And shooting the panoramic multishot
13 photograph which showed the size in a fine art manner
14 and communicated the way I was feeling before the
15 vastness became interesting.

16 BY MS. GATES:

17 Q. Was the event itself interesting to you?

18 A. I'm a fine art -- professional fine art
19 photographer, so the event would be nothing without --
20 to me it would be nothing without the creation of my
21 fine art photography, with my gear.

22 Q. After you shot photographs, were you interested
23 in learning more about the event?

24 A. From this e-mail I was inquiring -- I have a
25 background in physics, and I studied art my entire life.

1 I have a fair amount -- I'm an outdoors person, so I
2 have a fairly good idea of the sizes of things, but I
3 needed a second opinion, you know, from an expert from
4 the park. So, yeah, I was interested in finding out
5 more about the size. And I have realized that it was a
6 huge lake, so I used different photographic techniques
7 to communicate the vastness that I felt in there.

8 Q. If you hadn't had the chance to photograph it,
9 would you have still found the lake to be interesting?

10 MS. ZAHARIA: Objection. Vague.

11 THE WITNESS: Probably not in a -- especially
12 not in the fine arts context.

13 BY MS. GATES:

14 Q. What about in any other context?

15 A. Not really. I go in the outdoors. I love the
16 outdoors. But at the end of the day, I'm there to
17 create fine art.

18 Q. Would you be interested in the lake at a -- in
19 a science context?

20 MS. ZAHARIA: Objection. Vague.

21 THE WITNESS: Not sure how much science -- if
22 the science is fairly straightforward, so I don't know
23 if, like, a scientific context would be just -- for me
24 it was a fine art -- definitely a huge fine art
25 interest.

1 BY MS. GATES:

2 Q. Do you recognize this document?

3 A. Yes, I believe --

4 Q. What --

5 A. -- so.

6 Q. Go ahead.

7 A. Yes, I do.

8 Q. What is it?

9 A. It's correspondence with Nicole Yin who works
10 with the National Parks Conservation Association.

11 MS. GATES: All right. I would like to
12 introduce this as Defendant's Exhibit 21. It bears
13 Bates No. MCGUCKEN38.

14 (Exhibit 21 remotely introduced and marked)

15 BY MS. GATES:

16 Q. Who is Nicole Yin?

17 A. She's a senior creative manager of creative
18 projects at the National Parks Conservation Association.

19 Q. And what is the National Parks Conservation
20 Association?

21 A. I feel the title's descriptive. It's the
22 National Parks Conservation Association.

23 Q. Is it a government entity?

24 A. I believe so, or at least nonprofit.

25 Q. Have you -- before this communication, had you

1 ever worked with Nicole Yin or the National Parks
2 Conservation Association before?

3 A. I don't believe so.

4 Q. This e-mail references an attachment. Do you
5 know if these attachments were ever produced?

6 A. Attachments. Where does it -- can you scroll a
7 little bit or -- what attachment does it reference?

8 Q. Give me a minute. It says "attached please
9 find" --

10 A. Oh, I believe. I believe. Oh, I believe I got
11 those.

12 Q. Do you recall if you ever produced them in this
13 litigation?

14 A. I'm not sure if I have or not.

15 Q. Would you be able to check?

16 A. Yes, it should be there.

17 Q. Do you recall what -- and I'll shorten the name
18 of this association to NPCA going forward -- do you
19 recall what NPCA's pay rates were?

20 A. I forget. It's in the document.

21 Q. Have you produced any documents that reference
22 NPCA's pay rates?

23 A. I believe so.

24 Q. Do you know whether NPCA used any of your
25 photos?

1 A. I believe they did.

2 Q. Do you know how many photos they used?

3 A. I believe two. At least one, maybe two.

4 Q. Did you charge NPCA a license fee?

5 A. Yes, I did.

6 Q. Do you recall what you charged?

7 A. No, I don't recall.

8 Q. Do you recall why you charged a license fee to
9 NPCA in this instance?

10 A. I believe they offered to pay it.

11 Q. Is that the only reason you charged a license
12 fee in this instance?

13 A. Maybe there are other reasons. I'm not sure.
14 I don't recall.

15 Q. So you can't recall of any other reasons why
16 you would have -- or would not have charged NPCA a
17 license fee?

18 A. No, not offhand. I can't recall exactly what I
19 was thinking.

20 Q. Do you recall filing anything for the NPCA?

21 A. I don't recall.

22 Q. Do you recall preparing any type of agreement
23 in connection with the use for the NPCA?

24 A. I think I might have prepared an invoice.

25 Q. Do you recognize this document?

1 A. Yes.

2 Q. What is it?

3 A. It's an invoice for me for use of my image.

4 Q. And it's invoice to the NPCA?

5 A. Yeah.

6 MS. GATES: All right. I would like to mark
7 this as Defendant's Exhibit 22. You'll see it's a
8 document bearing Bates No. MCGUCKEN39.

9 (Exhibit 22 remotely introduced and marked)

10 BY MS. GATES:

11 Q. So you prepared this invoice personally?

12 A. Yes, I did.

13 Q. And the date of this invoice is July 3rd, 2019;
14 is that correct?

15 A. Yes, I believe so.

16 Q. Do you recall why the -- this invoice is dated
17 July 3rd, 2019?

18 A. I believe that's when they were making the
19 agreement. Unless it's a typo, but I believe that's
20 around why.

21 Q. How often, after you are contacted by someone,
22 would you prepare an invoice?

23 A. When I need to.

24 Q. Do you typically prepare an invoice right away,
25 or do you wait any period of time?

1 A. It all depends the details of when it's
2 requested.

3 Q. If we can go back to the previous exhibit.
4 This e-mail was dated March 20, 2019.

5 A. Yes.

6 Q. And I'm going back to Exhibit 22, this invoice
7 is dated July 3rd, 2019.

8 A. Yes.

9 Q. Do you know why there's a difference between
10 those two dates?

11 A. I forget. There might have been a lapse in our
12 communications, but I forget exactly why.

13 Q. And this invoice references images. Do you
14 know if multiple images were licensed to NPCA?

15 A. I forget exactly which one were used.

16 Q. Would it have been more than one image?

17 A. It might have been.

18 Q. What does "1/4-page use" mean?

19 A. A "1/4-page use"?

20 Q. Yes.

21 A. Yeah. I believe that means they're a magazine.

22 Q. So does that term in this invoice refer to a
23 1/4-page of a magazine?

24 A. Yes.

25 Q. And what does "\$50 on web" mean?

1 A. \$50 for use online.

2 Q. So were the images by NPCA used in two separate
3 mediums?

4 A. Yes. I believe they were used both online and
5 in print.

6 Q. Do you recall if they were used anywhere else
7 at NPCA?

8 A. I don't recall.

9 Q. Do you typically differentiate in the license
10 fee between a magazine use and an online use?

11 A. I -- it varies widely. This was their rates, I
12 believe, so I used those.

13 Q. So would these be your typical rates for a
14 print image and on online image?

15 A. It varies widely. Being published with the
16 National Parks Conservation Association seems like a
17 service and an honor, so it's all taken in account.

18 Q. If being published with the NPCA is a service
19 and an honor, would you charge no license fee?

20 A. I would have to think about it and consider it.
21 I forget exactly what I was thinking at the time, but I
22 would have to consider it.

23 Q. And what would you -- what specifically would
24 you consider?

25 A. All the factors that we referred to before.

1 The nature of use, how it dilutes my work, what it's
2 being used for, so all those things. How to contact me,
3 everything.

4 Q. Do you recognize this document?

5 A. Yes.

6 Q. What is it?

7 A. It is the image that appeared on the website of
8 the National Parks Conservation Association.

9 MS. GATES: All right. We would like to
10 designated this document bearing Bates No. MCGUCKEN41
11 through 43 as Defendant's Exhibit 23.

12 (Exhibit 23 remotely introduced and marked)

13 BY MS. GATES:

14 Q. Do you recall when your images were published
15 by the NPCA?

16 A. I don't recall. Is there a dates on there?
17 Summer 2019. There you go.

18 Q. Do you recall when in summer 2019?

19 A. I don't recall.

20 Q. In addition to the e-mail you saw earlier, did
21 you speak to the NPCA separately?

22 A. I think I did. I can't recall.

23 Q. Did you speak with them by phone?

24 A. Yes, I believe I did.

25 Q. And on the second page here, this thumbnail

1 image of the magazine, is this the magazine that your
2 image would have appeared in?

3 A. Yes. It would have been.

4 Q. Do you know who receives NPCA's magazine?

5 A. Yeah --

6 MS. ZAHARIA: Objection. Calls for
7 speculation.

8 THE WITNESS: Yeah, I'm not sure. Subscribers.

9 BY MS. GATES:

10 Q. Do you subscribe to the NPCA's magazine?

11 A. I don't, but I did receive a copy.

12 Q. Do you recognize this document?

13 A. Yes.

14 Q. What is it?

15 A. It is a correspondence with the "Daily Mail."

16 MS. GATES: All right. We would like to
17 introduce this document bearing MCGUCKEN59 through 63 as
18 Defendant's Exhibit 24.

19 (Exhibit 24 remotely introduced and marked)

20 BY MS. GATES:

21 Q. I believe this e-mail exchange that starts at
22 the bottom, so I'll start at the bottom of the document
23 here and scroll up.

24 A. Okay.

25 Q. Do you know who Sarah Feinsmith is?

1 A. I don't.

2 Q. Had you worked with Sarah Feinsmith -- or the
3 "Daily Mail" before this --

4 A. No.

5 Q. -- correspondence?

6 A. I don't believe so.

7 Q. Do you know why the "Daily Mail" is reaching
8 out in May of 2019?

9 A. It says -- in one of her e-mails she says, "One
10 of our editors was struck by your photos of the flooding
11 in Death Valley as seen here."

12 Q. So you testified that you had taken the photos
13 in March 2019; is that correct?

14 A. Yes.

15 Q. Do you know why the "Daily Mail" is reaching
16 out in May 2019?

17 A. Just this is the e-mail that I had.

18 Q. In this e-mail, what did you mean by
19 "syndicate"?

20 A. Which is the usage -- I guess I meant are they
21 only going to be shared on the "Daily Mail" site or are
22 they going to syndicate them to other sites?

23 Q. What does "syndicate" mean in that sentence?

24 A. I'm no expert, but in general I think it means
25 sharing it more broadly if you syndicate something. I

1 don't know if it's legal or technical, but generally
2 speaking I think to syndicate is to share more broadly.

3 Q. When you said, "I'm no expert," what are you
4 referring to?

5 A. I'm no expert in legal terminology, what
6 "syndicate" means.

7 Q. Is "syndicate" a legal term?

8 A. I assume it can be.

9 Q. Do you recall if you ever sent the image files
10 directly to the Daily Mail?

11 A. I don't recall. I don't think so.

12 Q. Do you know if the "Dally Mail" ever used your
13 photograph?

14 A. Yes, they did.

15 Q. Did you select the photographs the "Daily Mail"
16 used?

17 A. I believe they selected them, and I believe
18 they added 45EPIC Elliot McGucken Fine Art on them. And
19 also, you can see that they published -- enhanced my
20 brand by publishing how I set up the composition with
21 the golden ratio, as I often do.

22 Q. So you trusted the Daily Mail to select the
23 photographs?

24 A. Yes.

25 Q. Do you know if the Daily Mail used the YouTube

1 video that you're referring to in this e-mail?

2 A. I'm not sure.

3 Q. Do you recall if you ever provided the video
4 file or just the link to the YouTube video?

5 A. I believe just the link.

6 Q. Do you recall how much the Daily Mail paid you
7 as far as a license fee for the use of the photos?

8 A. I believe it's included in the correspondence,
9 so that's better than my memory, whatever is written
10 there.

11 Q. It is \$250 --

12 A. I believe so.

13 Q. That's correct?

14 A. I believe so.

15 Q. When they rate \$250 per selection, do you know
16 specifically what they're referring to?

17 A. The act of selecting photos for their article.

18 Q. Do you know -- or do you recall whether they
19 specified how many photos they would use for this amount
20 of money?

21 A. I believe it's all contained in here, so I'm
22 not sure.

23 Q. Did the Daily Mail ultimately pay you this
24 license fee?

25 A. Yes, they did.

1 Q. Is this e-mail accurate, that the Daily Mail
2 shared 20 images for \$250?

3 A. I believe so.

4 Q. And is this accurate that the Daily Mail
5 grabbed them from the link you shared once they had your
6 permission?

7 A. I believe so.

8 Q. Do you know how the Daily Mail would have
9 grabbed the images from the link you shared?

10 MS. ZAHARIA: Objection. Calls for
11 speculation.

12 THE WITNESS: I don't know.

13 BY MS. GATES:

14 Q. Is this -- is this \$250 typical of the license
15 fee for online use?

16 A. It all -- all depends from case to case.

17 Q. For the Daily Mail or a similar publication, do
18 you think \$250 for 200 images is a typical fee for
19 online use?

20 A. I don't know. This article also allowed me to
21 talk about the golden ratio and enhance my brand. And
22 they are also saying that the fine art photographs are
23 beautiful, so that's in good faith that they are going
24 to enhance my fine art artistic brand. So all that
25 comes into the price, so different situations. There

1 are many different factors that weigh in.

2 Q. If the Daily Mail had not paid a license fee,
3 would you have permitted the use in this instance?

4 A. Probably not.

5 Q. Why is that?

6 A. Because I asked for one.

7 Q. Why did you ask for a license fee?

8 A. It all comes down to what I'm feeling at the
9 moment, so I was leaning towards asking for a license
10 fee.

11 Q. Do you recall what you were feeling at the
12 moment when you sent that e-mail?

13 A. No. I just felt it appropriate to ask for a
14 license.

15 Q. Did you ask the Daily Mail to provide a link to
16 your website or social media account?

17 A. I believe they said, "How did you want to be
18 credited," and I think I told them somewhere in the
19 e-mail. And yeah, there's the photo credit. So yeah,
20 that's -- I'm not sure exactly what I put for it all,
21 but definitely that photo credit that is bolstering and
22 announcing how my fine art brand works.

23 Q. Do you recall why you offered the choice
24 between the two different photo credits?

25 A. Well, it says here that shorter is better. I'm

1 a nice guy trying to work with an editor, so 45EPIC,
2 45EPIC Fine Art works for me.

3 Q. Did you think that "45EPIC" was more important
4 to include in the shorter credit than the term "fine
5 art"?

6 A. At the moment, though, I could go back and
7 forth on that. Plus, I was writing a large body of the
8 article that was really giving my views and personality
9 and fine art perspective in there, so...

10 Q. You said you were writing a large body of the
11 article. Do you mean that the "Daily Mail" allowed you
12 to write the majority of the piece that was ultimately
13 published?

14 A. I don't remember the specifics, but I remember,
15 I think, that they had mentioned the golden ratio and my
16 story of the composition, but I don't remember the
17 specifics. But that was nice to see.

18 Q. Did they -- did the "Daily Mail" give you the
19 opportunity to have final approval or to edit the
20 article before it was published?

21 A. I'm sure they would have if I would have put
22 something in there a little extra, but I was generally
23 pleased.

24 Q. And did you have any further communications
25 with the "Daily Mail" about the photos after?

1 A. I believe that was it. I believe they sent me
2 an invoice or I sent them or they created an invoice for
3 me to complete.

4 Q. Do you recognize this document?

5 A. Yes.

6 Q. Is this the "Daily Mail" invoice you're
7 referring to?

8 A. Yes.

9 MS. GATES: All right. We'd like to introduce
10 this document bearing Bates No. MCGUCKEN69 as
11 Defendant's Exhibit 25.

12 (Exhibit 25 remotely introduced and marked)

13 BY MS. GATES:

14 Q. Do you recall when you first received this
15 invoice?

16 A. Approximately.

17 Q. Approximately when?

18 A. When -- probably -- is there a date on it -- or
19 I can check my e-mail. Maybe around May, because it
20 says 16 May, so probably in May sometime. Or the
21 invoice date is in June, so right around then.

22 Q. And after you received this invoice, did the
23 "Daily Mail" pay the invoice?

24 A. I believe I received -- yeah, I believe I got
25 paid.

1 Q. Do you know why the "Daily Mail" is listing two
2 different -- different entries on this invoice?

3 A. No. I guess maybe they used the photos twice.

4 Q. Do you -- are you referring to two separate
5 articles?

6 A. I don't know if they used two different titles.
7 I -- I don't know.

8 Q. Did you -- after -- after you received this
9 invoice and the articles were published, did you ever go
10 and look at the articles?

11 A. Yeah, I believe so.

12 Q. Do you recall seeing two separate articles?

13 A. No, I don't think I recall seeing two separate
14 articles. It was one article, two different versions.
15 I forget. I remember seeing the Golden -- I was most
16 excited when I saw them mention the golden ratio, so...

17 Q. Do you recognize this document?

18 A. I think so. I mean, I recognize the "Daily
19 Mail" and my photographs.

20 Q. Is this the "Daily Mail" article that published
21 your photograph?

22 A. I think so.

23 MS. GATES: All right. I would like to
24 introduce this document bearing Bates No. MCGUCKEN31
25 through 37 as Defendant's Exhibit 26.

1 (Exhibit 26 remotely introduced and marked)

2 BY MS. GATES:

3 Q. Can you point out where they reference -- the
4 "Daily Mail" referenced the "golden ratio" you were
5 referring to?

6 A. Just scroll down.

7 Q. (Scrolls.)

8 A. Oh, there you go. If you look down right above
9 the red writing, "In composing the photograph, I set the
10 horizon at the golden cut as the height of the panorama,
11 thusly using the golden ratio in the composition -- a
12 classical technique and art often referred to as "the
13 divine proportions."

14 Q. Do you know how the "Daily Mail" received this
15 quote?

16 A. Do I know how they received it? I believe it
17 was in the e-mail that we were just looking at.

18 Q. Are you aware of any other publications that
19 used your photos, aside from the ones that we've seen
20 today?

21 A. Off the top of my head, I don't believe so.

22 Q. Have you ever seen this screenshot before?

23 A. I don't believe so.

24 Q. Have you ever visited the website
25 expressdigest.com before?

1 A. I don't recall, no. I'm not sure, but I don't
2 recall.

3 Q. Do you recognize these photos in this post?

4 A. That's my photograph. That's my photograph.
5 That's my photograph.

6 Q. Were you aware of the -- this use of your
7 photograph before today?

8 A. I don't think I was.

9 Q. Have you ever worked with "Express Digest"
10 before?

11 A. To the best of my knowledge, I don't think so.

12 Q. Did you give "Express Digest" permission to use
13 your photos in this instance?

14 A. I don't think I did. Do you have a date for
15 this? I don't recall.

16 Q. Do you have any idea how "Express Digest" may
17 have obtained these photographs?

18 MS. ZAHARIA: Objection. Speculation.

19 THE WITNESS: No idea.

20 BY MS. GATES:

21 Q. Do you see this line at the bottom that says,
22 "Read more at dailymail.co.uk"?

23 A. Yeah.

24 Q. Do you know if "Express Digest" has any type of
25 relationship with the "Daily Mail"?

1 A. I do not.

2 Q. When you approved -- or licensed the photos to
3 the "Daily Mail," did you permit the "Daily Mail" to use
4 the images outside of their own domain?

5 A. I don't believe I did.

6 MS. GATES: Just to preserve this record, we'd
7 like to introduce this as Defendant's Exhibit 27.

8 (Exhibit 27 remotely introduced and marked)

9 BY MS. GATES:

10 Q. So switching tracks here a bit, do you recall
11 when you first created your Instagram account?

12 A. 2015 or 2016.

13 Q. So how familiar would you say you are with
14 Instagram's platform?

15 MS. ZAHARIA: Objection. Vague.

16 THE WITNESS: What do you mean by "familiar"?

17 BY MS. GATES:

18 Q. Would you characterize yourself as a novice or
19 as an amateur or as a professional?

20 MS. ZAHARIA: Objection. Vague.

21 THE WITNESS: Yeah. I'm not sure what those
22 mean in terms of user. I don't know.

23 BY MS. GATES:

24 Q. Do you feel that you have an adequate
25 understanding of Instagram's platform and how it works?

1 MS. ZAHARIA: Objection. Vague.

2 THE WITNESS: I don't know.

3 Compared to Mark Zuckerberg or -- I'm not sure.

4 BY MS. GATES:

5 Q. Do you make use of all of Instagram's platform
6 features?

7 MS. ZAHARIA: Objection. Vague.

8 THE WITNESS: I don't know if I'm aware of all
9 the features.

10 BY MS. GATES:

11 Q. How many features do you use on Instagram?

12 MS. ZAHARIA: Objection. Vague.

13 THE WITNESS: What do you mean by "feature"?

14 BY MS. GATES:

15 Q. I mean an option or a function of the platform.

16 MS. ZAHARIA: Objection. Vague.

17 THE WITNESS: I don't -- I don't really know
18 what you -- what constitutes a "feature."

19 BY MS. GATES:

20 Q. Are you aware of an Instagram embedding
21 function?

22 MS. ZAHARIA: Objection. Vague.

23 And to the extent that your understanding comes
24 from conversations with your attorneys, I'm going to
25 instruct you to not answer based on privilege. And to

1 the extent you have an independent -- independent
2 understanding outside of conversations with your
3 attorneys, you can answer the question.

4 THE WITNESS: What was the question?

5 BY MS. GATES:

6 Q. Are you aware of Instagram's embedding
7 functions?

8 MS. ZAHARIA: Same objection.

9 THE WITNESS: Vaguely.

10 BY MS. GATES:

11 Q. How would you describe Instagram's embedding
12 functions?

13 MS. ZAHARIA: Same objection.

14 THE WITNESS: I'm not sure. What is the
15 "embedding function"?

16 BY MS. GATES:

17 Q. Do you know what "embedding" means?

18 MS. ZAHARIA: Same objection.

19 THE WITNESS: I've seen it used in different
20 contexts, various meanings.

21 BY MS. GATES:

22 Q. What context are you referring to?

23 A. Well, what do you mean by "embedding"?

24 Q. What do you mean by "embedding"?

25 A. Well, technically it's to embed one thing

1 inside another.

2 Q. What do you mean "one thing inside another"?

3 A. I guess -- I'm not sure, exactly. It varies so
4 widely depending on what you're talking about.

5 Q. Do you understand technically how embedding
6 works?

7 MS. ZAHARIA: Objection. Vague. Ambiguous.

8 THE WITNESS: Not -- I mean, I'm not sure what
9 you mean by -- what you mean by "technically."

10 BY MS. GATES:

11 Q. Like the -- I mean, technical function.

12 A. Well, what do you mean by "technical function"?

13 Q. Technology.

14 MS. ZAHARIA: Objection. Vague and ambiguous.

15 THE WITNESS: Well, I think the entire Internet
16 is based on technology.

17 BY MS. GATES:

18 Q. When you put a YouTube video on your website,
19 do you think that's embedding?

20 A. It depends exactly how you do it, I suppose.

21 Q. How do you do it?

22 A. I can't recall exactly how I've done it before.

23 Q. Have you ever embedded anything?

24 MS. ZAHARIA: Objection. Vague and ambiguous.

25 THE WITNESS: Well, I think that means so many

1 different things, so it's tough for me to say. I'm not
2 sure what you mean by "embedding."

3 BY MS. GATES:

4 Q. Do you offer embedding on your website?

5 MS. ZAHARIA: Objection. Vague.

6 THE WITNESS: As a general -- I mean, embedding
7 on my website? Who would I offer that to?

8 BY MS. GATES:

9 Q. Viewers or users of your website.

10 A. Do I allow people to embed things on my
11 website?

12 Q. Do you offer a function where others can embed
13 content from your website?

14 MS. ZAHARIA: Objection. Vague and ambiguous.

15 THE WITNESS: I'm not sure. I think people can
16 embed what they want on my website.

17 BY MS. GATES:

18 Q. On your website, do you offer a function where
19 someone can copy HTML code from your website --

20 MS. ZAHARIA: Objection.

21 BY MS. GATES:

22 Q. -- in order to embed content somewhere else?

23 MS. ZAHARIA: Objection. Vague and ambiguous.

24 THE WITNESS: I don't know. Depending on the
25 expertise, I think some people can copy what they want

1 and embed it, not that it's legal, but I think they can
2 do it.

3 BY MS. GATES:

4 Q. Let's go back to Exhibit 7. Looking at this
5 arrow in the right side of the screenshot, do you know
6 what that is?

7 A. I don't recall. Is that a play button? Which
8 arrow?

9 Q. Well, there's two icons. I'm talking about the
10 icon with the arrow on the left.

11 A. I'm not familiar right at this point with that.

12 Q. Do you know how to check if your website has an
13 embedding function?

14 MS. ZAHARIA: Objection. Vague.

15 THE WITNESS: I'm not sure what an embedding
16 function is.

17 BY MS. GATES:

18 Q. Do you know how to check if your website offers
19 an embed code?

20 MS. ZAHARIA: Objection. Vague.

21 THE WITNESS: Yeah, I think depending on who
22 the end user is, every website offers an embed code, but
23 not that that's legal to embed someone's else's work.

24 BY MS. GATES:

25 Q. What do you mean by "legal"?

1 MS. ZAHARIA: Objection. Seeking legal
2 conclusion.

3 THE WITNESS: I'm no expert, but, again, the
4 Constitution states that the artist have full rights to
5 the work that they create so as to promote the creation
6 of more art.

7 BY MS. GATES:

8 Q. Have you ever read Instagram's terms of
9 service?

10 MS. ZAHARIA: Objection.

11 THE WITNESS: No.

12 BY MS. GATES:

13 Q. Have you ever read any of Instagram's policies?

14 MS. ZAHARIA: Objection. Vague.

15 THE WITNESS: Not directly.

16 BY MS. GATES:

17 Q. Have you ever worked with Newsweek before?

18 A. I don't believe so.

19 Q. Have you ever spoken to or corresponded with
20 anyone at Newsweek?

21 A. I don't believe so.

22 Q. How did you discover that Newsweek had used one
23 of your photos in an article?

24 MS. ZAHARIA: I'm going to object to the extent
25 that this calls for attorney-client communications.

1 BY MS. GATES:

2 Q. Without getting into any privileged
3 communication, same question.

4 A. I believe the Newsweek reporter left a note on
5 my image.

6 Q. When you say "on your image," what do you mean?

7 A. They left a comment on my image.

8 Q. Did you respond to that comment?

9 A. I don't believe so.

10 Q. Why not?

11 A. It is rather unprofessional.

12 Q. Why is it unprofessional?

13 A. I forget the exact phrasing, but it didn't seem
14 they saw my work as fine art.

15 Q. And so for that reason you did not respond?

16 A. I forget the details. There was no incentive
17 for me to respond.

18 Q. What do you mean by "incentive"?

19 A. What do you mean by "incentive"?

20 Q. Well, you used "incentive" first, so I'm asking
21 for your definition in that context.

22 A. Oh, yeah. Well, in the context of building my
23 fine art brand as many places help me do, and providing
24 monetary incentives as other places did.

25 Q. So "incentive" to you means building your fine

1 art brand and monetary compensation?

2 A. Yes, amongst other things, perhaps.

3 Q. What other things?

4 A. Well, chiefly, those two.

5 Q. Do you recall when you saw those comments on
6 your photo?

7 A. I don't recall, exactly.

8 Q. Without getting into any privileged
9 communications, what did you do in response to that
10 comment?

11 A. I did not respond, I don't believe.

12 Q. Did you ever read or review an article
13 published by "Newsweek" regarding your image?

14 A. Yes, I saw the article.

15 Q. Do you recall when you saw the article?

16 A. Probably around the same time I saw the
17 comments, but I don't recall exactly.

18 Q. When you saw the article, did you do anything
19 in response, without getting into any privileged
20 communication?

21 A. No.

22 Q. Were you concerned by "Newsweek's" use of the
23 image?

24 A. Yes.

25 Q. How so?

1 A. They didn't have my consent.

2 Q. Why did "Newsweek" not have your consent?

3 A. They didn't receive my consent.

4 Q. When you say "receive my consent," what does
5 that mean?

6 A. What do you mean by "consent"?

7 Q. You said "consent," so I'm asking for your
8 definition in that context.

9 A. The consent is to give permission, I believe.

10 Q. After publication of the article, did you ever
11 reach out to "Newsweek"?

12 A. I don't believe I did.

13 Q. Did someone else reach out on your behalf?

14 A. My attorneys.

15 Q. Do you recall when your attorneys reached out?

16 A. I don't recall.

17 Q. Do you recall how your attorneys reached out to
18 Newsweek?

19 A. I don't recall.

20 Q. Do you recall who at "Newsweek" your attorneys
21 reached out to?

22 A. I don't recall.

23 Q. And do you know if your attorneys ever received
24 a response from "Newsweek"?

25 A. I don't recall.

1 Q. Why did you choose not to contact "Newsweek"
2 directly?

3 A. I rely on the expertise of my attorneys.

4 Q. So without getting into privileged
5 communications, what is your recollection from that time
6 period?

7 A. My recollection is about --

8 MS. ZAHARIA: You are not to disclose any
9 attorney-client communications, and I -- I don't believe
10 that he can answer this without disclosing any
11 attorney-client communications. So I'm going to
12 instruct the witness not to answer on the basis of
13 privilege.

14 (Instruction not to answer)

15 BY MS. GATES:

16 Q. Have you ever seen this document before?

17 A. I believe so.

18 Q. What is it?

19 A. It's a letter from my attorneys to "Newsweek."

20 MS. GATES: All right. We'll introduce the
21 document bearing Bates No. MCGUCKEN 12 through 15 as
22 Defendant's Exhibit 20.

23 (Exhibit 20 remotely introduced and marked)

24 BY MS. GATES:

25 Q. Do you know if you saw this letter before

1 April 3rd, 2019?

2 MS. ZAHARIA: Objection. To the extent this
3 calls for attorney-client communications, I'm going to
4 instruct the witness not to answer.

5 (Instruction not to answer)

6 BY MS. GATES:

7 Q. Do you have any recollection of when this
8 letter was sent out?

9 A. No recollection.

10 Q. Do you have any recollection of whether this
11 letter was ever received?

12 A. No recollection.

13 Q. And do you have any recollection of whether
14 this letter was ever responded to?

15 MS. ZAHARIA: I'm going to object to the extent
16 this calls for attorney-client communications.

17 BY MS. GATES:

18 Q. So aside from the Instagram comment you had
19 referred to previously, did the writer of the "Newsweek"
20 article ever reach out to you directly?

21 A. I don't recall seeing anything.

22 Q. Has anyone told you they would not use your
23 photo because it had been used by "Newsweek"?

24 A. I'm not sure. I don't recall.

25 Q. Are you aware of any other uses of your photos,

1 other than the ones that we've already seen today?

2 A. I don't believe so.

3 Q. Have you ever seen this document before?

4 A. I don't believe I have.

5 Q. Is this your photograph?

6 A. Yes, it is.

7 Q. Were you aware of this use of your photograph
8 before today?

9 A. I don't recall.

10 Q. Do you know how this photograph is being shown
11 on this page?

12 MS. ZAHARIA: Objection. Calls for
13 speculation.

14 THE WITNESS: Yeah. I'm not sure.

15 BY MS. GATES:

16 Q. Is this your Instagram account handle?

17 A. Yes.

18 Q. And does this say "view more on Instagram"?

19 A. Yes.

20 Q. Do you have an understanding of whether this is
21 a screenshot or an embed to Instagram?

22 MS. ZAHARIA: Objection. Calls for
23 speculation.

24 THE WITNESS: Yeah. Well, as I'm viewing it
25 here, it's a screenshot.

1 BY MS. GATES:

2 Q. How do you know it's a screenshot?

3 A. Because if I click on it, it doesn't go
4 anywhere.

5 Q. That's why I'm sharing my screen.

6 A. What?

7 Q. This document is a screenshot, but you won't be
8 able to click on it --

9 A. Yeah.

10 Q. -- while it's in screen share.

11 Is there any other reason to lead you to
12 believe that this is a screenshot versus an Instagram
13 embed?

14 A. I'm not sure.

15 Q. So you can't say with certainty sitting here
16 today that this is not an Instagram embed?

17 A. Well, it seems like a screenshot.

18 Q. Why does it seem like a screenshot?

19 A. Because it's an image that seems like a
20 screenshot. I mean, that's what you're talking about, I
21 believe.

22 Q. Are you talking about my document, or are you
23 talking about this box containing your photo within the
24 document?

25 A. Yeah. Well, it's a PDF, so a PDF, I think,

1 basically has -- the pictures are embedded in the PDF.

2 Q. Are you familiar with this website, IFLScience?

3 A. I don't recall. I don't believe so.

4 Q. Have you ever worked with "IFLScience" before?

5 A. I don't believe so.

6 Q. Did you give "IFLScience" permission to use
7 your photo in this instance?

8 A. I do not believe so.

9 Q. Did you send "IFLScience" any letter or notice
10 in response to this use?

11 A. I'm not sure. I don't believe so.

12 MS. GATES: All right. Just to preserve the
13 record, I would like to designate this document as
14 Defendant's Exhibit 29.

15 (Exhibit 29 remotely introduced and marked)

16 BY MS. GATES:

17 Q. Have you ever seen this document before?

18 A. I don't believe so.

19 Q. Is this your photo?

20 A. That is my photo.

21 Q. Were you aware of this use of your photo before
22 today?

23 A. I don't think so.

24 Q. Have you worked with the "Hartford Courant"
25 before?

1 A. No, I don't believe I have.

2 Q. Have you visited the "Hartford Courant's"
3 website before?

4 A. I don't think so.

5 Q. Did you give "Hartford Courant" permission to
6 use this photo?

7 A. No, I did not.

8 Q. Did you give the "Hartford Courant" permission
9 to embed this photo?

10 A. No, I did not.

11 Q. Reviewing this caption on the second page here,
12 is this the same caption that was displayed on
13 Instagram?

14 A. It looks like it.

15 Q. And this reference to 581 likes, is this the
16 same number of likes that was displayed on Instagram?

17 A. Most likely.

18 Q. Did you send the "Hartford Courant" any letter
19 or notice in response to its use of your image?

20 A. I don't believe so.

21 MS. GATES: And just to preserve the record,
22 we'll mark that as Defendant's Exhibit 30.

23 (Exhibit 30 remotely introduced and marked)

24 BY MS. GATES:

25 Q. Have you ever seen this document before?

1 A. I don't believe so.

2 Q. Is this your photo?

3 A. It is.

4 Q. Were you aware of this use of your photo before
5 today?

6 A. I don't think I was.

7 Q. Did you give "The Independent" permission to
8 use this photo?

9 A. I don't think so, no.

10 Q. Did you give "The Independent" permission to
11 embed this photo?

12 A. I don't believe so.

13 Q. Had you ever worked with "The Independent"
14 before?

15 A. I don't believe so.

16 Q. Have you ever visited "The Independent's"
17 website before?

18 A. I think I have.

19 Q. Do you recall when?

20 A. No.

21 Q. Is this the same caption displayed on Instagram
22 with your photo?

23 A. Yes.

24 Q. Did you send "The Independent" any letter or
25 notice in response to this use?

1 A. Not yet. I don't believe so.

2 Q. When you say "not yet," what do you mean?

3 A. We haven't. I don't think we have.

4 MS. GATES: All right. To preserve the record,
5 we'll mark this document as Defendant's Exhibit 31.

6 (Exhibit 31 remotely introduced and marked)

7 BY MS. GATES:

8 Q. Have you seen this document before?

9 A. I don't recall.

10 Q. Is this your photo?

11 A. It is.

12 Q. Were you aware of its use before today?

13 A. I don't believe so.

14 Q. Are you familiar with "ScienceAlert"?

15 A. Not intimately.

16 Q. Have you ever worked with "ScienceAlert"
17 before?

18 A. I don't believe so.

19 Q. Have you ever visited "ScienceAlert's" website
20 before?

21 A. Not to my knowledge.

22 Q. Did you give "ScienceAlert" permission to use
23 this photo?

24 A. No.

25 Q. Did you give "ScienceAlert" permission to take

1 a screenshot of this photo?

2 A. I don't believe so.

3 Q. Are you concerned by "ScienceAlert's" use of
4 this photo?

5 A. I would have to investigate, but, yes.

6 Q. Why are you concerned?

7 A. They didn't get permission.

8 Q. Is your concern alleviated by viewing the
9 credit to Instagram below the image?

10 A. No.

11 Q. Did you send "ScienceAlert" any letter or
12 notice in response to this?

13 A. I don't believe so.

14 MS. GATES: To preserve the record, we'll mark
15 this document as Defendant's Exhibit 32.

16 (Exhibit 32 remotely introduced and marked)

17 BY MS. GATES:

18 Q. Have you ever seen this document before?

19 A. I believe I saw this.

20 Q. Do you recall when you saw this document?

21 A. I believe it was around the time that the
22 article came out in the Conservation -- National Parks
23 Conservation Association.

24 Q. How did you come across this document?

25 A. I believe the article was referenced by the

1 National Parks Conservation Association.

2 Q. Had you worked with the "L.A. Times" before
3 this article?

4 A. I have.

5 Q. Did you give the "L.A. Times" permission to use
6 your photo in this article?

7 A. No, not this one.

8 Q. When you first came across this article, were
9 you concerned by the use of your photo?

10 A. Yes.

11 Q. Why?

12 A. They hadn't asked permission.

13 Q. So the "L.A. Times" did not seek permission to
14 use your photo in this instance?

15 A. Yes.

16 Q. Did they -- the "L.A. Times," seek permission
17 to take a screenshot of your photo?

18 A. No.

19 Q. Did the "L.A. Times" seek permission to embed
20 your photo?

21 A. No.

22 Q. Did you ever send the "L.A. Times" a letter or
23 notice in response to its use?

24 A. Not yet.

25 Q. When you say "not yet," what do you mean?

1 A. It's something that's possible.

2 Q. If you saw this use in 2019, did you not want
3 to reach out to the "L.A. Times" at that time?

4 A. Well, it was put on the back burner. I was
5 confused by the article, because it seems it's not
6 referencing the lake that I took a photograph of.

7 Q. How so?

8 A. Well, Abby Wines says, "It is just a puddle, it
9 is not continuous, and it is shrinking fast." She was
10 never there, I don't believe.

11 Q. Do you know who Abby Wines is?

12 A. No.

13 Q. So you didn't reach out at the time because of
14 the contents of the article?

15 A. Somewhat. I think I saw it in the summer, and
16 it wasn't -- she was looking at something different from
17 the lake that I photographed, so I don't know what she
18 was looking at.

19 Q. So this article didn't raise concern in your
20 mind at the time?

21 A. No, because she was talking about puddles, and
22 obviously my video and photographs, there's a lake.

23 MS. GATES: All right. To preserve the record,
24 we will mark this document as Defendant's Exhibit 33.

25 (Exhibit 33 remotely introduced and marked)

1 BY MS. GATES:

2 Q. How do you know when someone has used your
3 image online?

4 MS. ZAHARIA: Objection. Vague.

5 THE WITNESS: Yes, various ways. Sometimes you
6 don't.

7 BY MS. GATES:

8 Q. When you say "various ways," what do you mean?

9 A. Sometimes they post a comment indicating that
10 they're using your image on the image, and sometimes
11 they don't.

12 Q. So do you rely on comments to know who uses
13 your image?

14 A. In part.

15 Q. Do you use any software to search for images
16 online?

17 A. Well, Google -- everybody has a reverse image
18 search.

19 Q. Do you Google reverse image search to search
20 for uses of your images?

21 A. I have.

22 Q. How often have you used Google reverse image
23 search for that purpose?

24 A. Oh, I don't know. I can't recall the exact
25 number.

1 Q. Is it more than 50 times you've used Google
2 reverse image search for that purpose?

3 A. Probably in my lifetime, yeah, more than 50.

4 Q. Is it more than a 100 times that you've used
5 Google reverse image search for that purpose?

6 A. If you add it all up, depending on the month
7 and how busy I am.

8 Q. Are there months when you would use Google
9 reverse image search more often to look for uses of your
10 photos?

11 A. Probably.

12 Q. Why so?

13 A. I'm not out in the field photographing.

14 Q. So if you're not out in the field photographing
15 for certain months, in particular, how often would you
16 estimate that you typically would use Google reverse
17 image search?

18 A. Oh, I'm not sure.

19 Q. Could you provide a ballpark estimate?

20 A. It -- it so depends. I don't -- I mean, it
21 depends on what's going on, and what I think is being
22 infringed, but, I mean, so it depends.

23 Q. Would you estimate once a day?

24 A. I don't think I've used it for the past month.

25 Q. Have -- have you used Google reverse image

1 search last month?

2 A. I think in February I did.

3 Q. How often did you use Google reverse image
4 search in February?

5 A. I'm not sure. Maybe -- I -- I have no -- I
6 don't recall. I don't keep track. It's just something
7 I do now and then.

8 Q. Would you say that you use Google reverse image
9 search a few days a month?

10 A. Not this past month. I didn't use it at all
11 really.

12 Q. How about in February?

13 A. Maybe in early February but not too much. I've
14 been on the road for a lot this whole year, so,
15 minimally.

16 Q. Do you use any other platforms or software to
17 search for uses of your image?

18 A. Yes.

19 Q. What platforms or software?

20 A. I use Pixie and TinEye.

21 Q. Do you -- are -- are those platforms or
22 software subscription fees?

23 A. Yes, Pixie is.

24 Q. How much is a Pixie subscription?

25 A. It varies.

1 Q. How much does Pixie charge you for a
2 subscription?

3 A. I think it's about 3,800 per year.

4 Q. So it's an annual subscription?

5 A. Yes.

6 Q. And what does Pixie do?

7 A. They reverse search images.

8 Q. So do you -- do you provide your images to
9 Pixie, and they reverse search it for you?

10 A. Basically.

11 Q. How many images do you provide to Pixie?

12 A. Let's see. Around 350,000 or a little bit
13 over.

14 Q. Is that all the images that you -- you take in
15 a year?

16 A. No. That's a collection.

17 Q. So how do you decide which images to provide to
18 Pixie?

19 A. Hmm, I mean most of my best ones are searched.

20 Q. When you say "best ones," what are you
21 referring to?

22 A. My best images.

23 Q. What do you mean by "best"?

24 A. My fine art images.

25 Q. Do you send images to Pixie that you've posted

1 on your website or social media?

2 A. Yes.

3 Q. Do you send images to Pixie that you have not
4 posted on your website or social media?

5 A. I don't think so. Maybe, but not -- I don't
6 think so.

7 Q. So what results do -- does Pixie provide to
8 you?

9 A. They provide various results, matches of
10 infringement.

11 Q. What do the results look like?

12 A. What do you mean, "look like"?

13 Q. Can you describe what you receive from Pixie to
14 me?

15 A. It gives you infringement reports or matches
16 based on the technology, so it's hit and miss.

17 Q. And when you say "infringement," what do you
18 mean?

19 A. People using images without consent.

20 Q. Is Pixie's system able to understand what
21 images are with and without consent?

22 MS. ZAHARIA: Objection. Vague.

23 BY MS. GATES:

24 Q. You can answer if you understand.

25 A. Not -- no.

1 Q. Are there matches that you receive that are
2 images that were used with your consent?

3 A. Yes.

4 Q. About how many matches are with consent?

5 A. I don't recall overall.

6 Q. And once you receive the matches, what do you
7 do with them?

8 MS. ZAHARIA: Objection. Vague.

9 THE WITNESS: I --

10 MS. ZAHARIA: It calls for attorney-client
11 communications.

12 BY MS. GATES:

13 Q. Outside of anything privileged, do you review
14 the matches?

15 A. Generally, yes.

16 Q. Do you review whether the matches are picking
17 up content that was used with your consent?

18 A. Yes.

19 Q. Typically, what percentage of matches do you
20 find were used with your consent?

21 A. I have no idea. That's such a nebulous -- I'd
22 have to -- that's so much -- really nebulous.

23 Q. Would you say that's more than typically more
24 than 50 percent or less than 50 percent?

25 A. Less than 50 percent.

1 Q. Do you or Pixie distinguish between different
2 types of uses?

3 A. Yes.

4 Q. How do you distinguish between different types
5 of uses?

6 A. They have the algorithms, and I have my
7 opinions. It's really -- it's somewhat of a nebulous
8 answer, so it's case-by-case basis.

9 Q. When you say "nebulous," what do you mean in
10 this context?

11 A. I mean it's somewhat abstract. It's hard to
12 pin down exact quantification.

13 Q. Does Pixie provide you with various categories
14 of matches?

15 A. Yes.

16 Q. What are some of those categories?

17 A. I believe they have by country, commercial,
18 noncommercial, different things. But, again, it's all
19 very hit or miss.

20 Q. What do you mean by "hit or miss"?

21 A. That expression means sometimes it's right;
22 sometimes it's wrong.

23 Q. How much time would you say that you spend
24 going over Pixie's results?

25 A. Over the past month, not at all.

1 Q. How about in the prior month, how much time
2 would you typically spend?

3 A. Maybe a few hours.

4 Q. And how do you know if a -- a result is a hit
5 or miss?

6 A. You look at it and you see what -- if it's hit
7 or miss.

8 Q. Do you compare it to your own records?

9 A. Yes.

10 Q. And are those records primarily your e-mail?

11 A. Various records, memories, e-mails, yes.

12 Q. Are there other record that you consult?

13 A. Not usually, no.

14 Q. When you're referring to commercial versus
15 noncommercial instances, how does Pixie differentiate
16 between those two?

17 A. I don't know their algorithm.

18 Q. Do you have an understanding of what Pixie
19 provides for commercial uses?

20 A. I think they mean, like, a commercial website.

21 Q. What do you mean by a "commercial website" in
22 this context?

23 A. A website usually that makes money.

24 Q. So any website that makes money?

25 A. I'm not sure why we're debating the word

1 "commercial." I think that it means a website that
2 makes money.

3 Q. And without getting into privileged
4 communication, what do you do with the Pixie results
5 that you think are without consent?

6 A. Oh, it all varies from case to case.

7 Q. Do you elevate it to take action, or do you
8 leave it be?

9 MS. ZAHARIA: Objection. Vague.

10 THE WITNESS: It varies from case to case.

11 BY MS. GATES:

12 Q. Can you give me an example?

13 A. Pertaining to this case, directly?

14 Q. Sure.

15 A. I don't think I've used Pixie to find any
16 infringements on this case.

17 Q. Do you have any other examples that come to
18 mind regarding Pixie?

19 A. Nothing specific. Again, it's a vary
20 case-by-case situation.

21 Q. Are there specific factors you consider when
22 you're evaluating these results case-by-case?

23 A. I'm no expert, but roughly.

24 Q. Roughly, what are the factors?

25 A. If it's a commercial website that's using it

1 commercially.

2 Q. Is that the only factor?

3 A. I'd say it's the leading major one.

4 Q. And there are other factors?

5 A. Not that I can think of.

6 Q. So in your example, when there's a commercial
7 website making a commercial use, do you take any action
8 yourself, or do you send it to someone else?

9 A. I generally almost always rely on the expertise
10 of my counsel.

11 Q. Do you recall how many copyright infringement
12 lawsuits you've been involved in as a plaintiff?

13 MS. ZAHARIA: Objection.

14 THE WITNESS: I don't know the exact number.

15 BY MS. GATES:

16 Q. Can you provide a best estimate?

17 A. I'm totally speculating. Maybe eight or nine.

18 MS. ZAHARIA: Madam Court Reporter, can you let
19 us know how much time we have on the record?

20 THE REPORTER: Yes. We'll have to go off the
21 record, and I'll have to tabulate that.

22 BY MS. GATES:

23 Q. Have you been a plaintiff in any other lawsuits
24 involving the -- the photos you took of the Death Valley
25 Lake?

1 A. I believe so.

2 Q. Do you recall the names of those lawsuits?

3 A. I would have to check records to make
4 absolutely sure, but, yeah, I believe -- I believe I
5 recall a couple of them.

6 Q. Do you recall the party name or defendant's
7 name in any of those lawsuits?

8 A. Ripley's Believe It Or Not, and, then, I
9 believe Vice. I think those two.

10 Q. So earlier today you had testified about
11 licensing income and licensing versus enforcements. Can
12 you estimate the amount of monthly income you would
13 receive from retroactive licenses or settlements in
14 comparison to licensing before use?

15 MS. ZAHARIA: Objection. Vague. Calls for
16 attorney-client communications.

17 BY MS. GATES:

18 Q. You can answer to the extent it doesn't get
19 into privileged communication.

20 A. I believe I've already provided those overall
21 numbers, but it -- so that includes everything.

22 Q. On that overall number you provided, is it
23 possible to narrow it to differentiate between the
24 amount you received for a license before the use?

25 A. Well, a lot of the settlements are

1 confidential, so I'm not sure.

2 Q. Without getting into any confidential
3 information regarding settlements, do you know what
4 percentage of the income is from licensing before use as
5 opposed to retroactive licensing?

6 MS. ZAHARIA: Objection.

7 BY MS. GATES:

8 Q. You can answer.

9 A. I don't think --

10 MS. ZAHARIA: Wait. He's not going to answer
11 regarding -- regarding settlement payments.

12 MS. GATES: I'm asking about licensing.

13 THE WITNESS: It's confidential.

14 MS. ZAHARIA: So --

15 THE WITNESS: I'm sure it's confidential.

16 BY MS. GATES:

17 Q. Licensing of your photos is confidential?

18 MS. ZAHARIA: Madam Court Reporter, could you
19 please read back the question?

20 (The record is read by the reporter as
21 follows:

22 "QUESTION: Without getting into any
23 confidential information regarding settlement,
24 do you know what percentage of the income is
25 from licensing before use as opposed to

1 retroactive licensing?"

2 And then there was the objection.

3 MS. ZAHARIA: Thank you.

4 Same objection.

5 And can we break now and also confirm how much
6 time we have left on the record?

7 MS. GATES: Can we just close out this question
8 first before the break?

9 MS. ZAHARIA: We're going to take a break now.

10 MS. GATES: When there's an open question
11 pending?

12 MS. WOLFF: You can't do that. You can't do
13 that with an open question. Excuse me, no.

14 MS. ZAHARIA: Privilege. We already objected
15 based on privilege.

16 MS. WOLFF: There's no privilege to a
17 percentage question that doesn't reveal anything
18 confidential. We can close the door --

19 MR. BURROUGHS: I don't mean to jump in here,
20 but generally speaking, there should be one questioning
21 attorney and one objecting attorney, and I object to the
22 extent that we now have a second attorney interposing
23 arguments on the record. I've been forced to do it.
24 And I move to --

25 MS. WOLFF: Sustained.

1 (Simultaneous colloquy)

2 MR. BURROUGHS: -- in response to defense
3 counsel making statements on the record that shouldn't
4 be made, particularly because she hasn't been on camera
5 for this entire time.

6 MS. WOLFF: That is because I have a sick
7 husband who is sitting behind me. Okay? He has
8 Parkinson's, and I don't really think you need to watch
9 this. All right? This is enough. She is --

10 MR. BURROUGHS: That's fine, but I do not
11 think -- I object -- I object to you yelling at my
12 attorney.

13 MS. WOLFF: You are not allowed --

14 (Simultaneous colloquy)

15 MR. BURROUGHS: She's asking a question --

16 MS. WOLFF: Excuse me. You are not allowed
17 to --

18 MR. BURROUGHS: She cannot --

19 MS. WOLFF: I don't care.

20 (Simultaneous colloquy)

21 THE REPORTER: I'm sorry. One at a time,
22 please, or we have to go off the record.

23 MR. DONIGER: If you want to -- if you want to
24 talk to your attorney, and if you want to -- then we can
25 do that, but I do not want you telling my attorney what

1 to do. Okay?

2 MS. GATES: I'd like to just close out the
3 question before the break.

4 THE WITNESS: It's confidential.

5 BY MS. GATES:

6 Q. All of your licensing income is confidential?

7 A. I believe -- I believe it is, except for what
8 was shared with this case.

9 Q. So separate from this case, all of your other
10 licensing information is confidential?

11 A. Oh, whatever you can't find publicly is
12 generally confidential.

13 Q. Does "confidential" mean "nonpublic"?

14 A. Partly. That's one way of interpreting it.

15 Q. How are you interpreting "confidential" in this
16 context?

17 A. Meaning, that it's private.

18 MS. ZAHARIA: I'm going to object. We left an
19 open-ended question to be asked. Now I would like to go
20 off the record.

21 MR. BURROUGHS: Before we do, Madam Court
22 Reporter, I just want to state, for the record, that
23 Ms. Wolff has been off camera for the majority of the
24 day today. She turned her camera on to get -- to enter
25 the record, make statements on the record, and then

1 provide directions as to how the deposition should
2 proceed. That's probably not visible in the court
3 reporter's transcript because you can't see the video,
4 but that is what happened.

5 So I'm going to lodge an objection, A, to a
6 second attorney entering the record to make statements
7 on the record and direct the proceedings;

8 And, B, that that was done by -- by an attorney
9 who hasn't been on camera today for the -- the entirety
10 of the session.

11 Thank you.

12 MS. WOLFF: It's only been for the last hour
13 because my aide has left and my husband almost fell, and
14 I needed to have him in the room, and your associate was
15 terminating a question before it was answered which is
16 not permitted.

17 MS. GATES: All right. Can we also let the
18 record reflect that Mr. Burroughs' camera has been off
19 for the majority of the day?

20 We can go off record.

21 (Recess)

22 BY MS. GATES:

23 Q. Going back to -- and let me remind you, sir,
24 that you're under oath.

25 Going back to what we were previously

1 discussing, can you estimate what percentage of your
2 monthly income comes from licensing?

3 And when I use the term "licensing" in this
4 instance, I'm referring to licensing before use of the
5 photo.

6 A. A lot of that is tied up in confidential
7 agreements, so the -- it's difficult for me to say it
8 without breaching that confidentiality.

9 Q. Okay. Without getting into any specific
10 numbers, could you provide a ballpark estimate of the
11 percentage of your monthly income?

12 A. I -- I mean, to me I don't -- it's -- it all
13 seems like licensing. I mean, it's payment for the use
14 of my art.

15 Q. Would you say that the percentage of your
16 monthly income from licensing -- for licensing before
17 use of the photos is less than 50 percent of your
18 income?

19 A. Probably.

20 Q. Would you say that licensing amount is less
21 than 40 percent of your income?

22 A. Probably.

23 Q. Would you say that licensing amount is less
24 than 30 percent of your income?

25 A. I'd have to go and check my records and look

1 into that.

2 Q. Could you provide an estimate of the percentage
3 you receive for retroactive licenses, the percentage of
4 your monthly income, I mean?

5 MS. ZAHARIA: I'm going to object to the extent
6 this calls for attorney-client communications.

7 BY MS. GATES:

8 Q. I'm not asking for any hard numbers, but just
9 the general percentage of your monthly income.

10 A. Well, it all depends on the month.

11 Q. I'm sorry. I -- I did not hear the end of what
12 you just said.

13 A. "Well, it all -- it all depends on the month."
14 It varies so much.

15 Q. So, for example, February of this year, could
16 you estimate what the percentage of your monthly income
17 was for retroactive licenses?

18 A. Yeah. That would have been higher than --
19 yeah. Maybe around 90 percent or more.

20 Q. Is that typical of the month, or would you
21 characterize February as being a particularly good
22 month?

23 A. Well, all months that I make money are good.
24 I -- yeah. It so varies from month to month, so it's
25 difficult for me to say.

1 Q. Could you provide an annual estimate for 2020
2 of what your ballpark percentage was from income for
3 retroactive licenses?

4 A. I'm trying to think. That's, like, difficult.
5 Maybe around the same number as well.

6 Q. When you say the "same number," overall, what
7 are you referring to?

8 A. Around 90 percent, but I would have to check
9 details.

10 Q. So would you say the estimate of your
11 percentage of annual income in 2020 for licensing -- and
12 this is licensing before use of the photos -- would you
13 estimate that that's 10 percent?

14 A. Somewhere around there. Again, I'd have to
15 check to make sure.

16 Q. In -- in comparing licenses before use of the
17 photos to retroactive licenses -- and without getting
18 into any specific numbers -- would you say that you
19 charge a premium rate for retroactive licenses?

20 A. I -- I rely on the expertise of my attorneys,
21 because that involves a lot of other factors.

22 Q. Would you say that you charge a higher rate?

23 A. I rely on the expertise of my attorneys,
24 because that involves a lot of factors.

25 Q. What factors are you talking about in this

1 instance without getting into any privileged
2 communications?

3 A. I believe when somebody steals something, there
4 is generally a penalty associated with that, and that's
5 generally determined by the court, and my attorneys are
6 far more privy to exactly how that works than I am.

7 Q. Would you equate a retroactive licensee with a
8 penalty?

9 MS. ZAHARIA: Objection to the extent this
10 seeks attorney/client communications. And objection.
11 Vague.

12 BY MS. GATES:

13 Q. Without getting into any privileged
14 communications, what's your personal understanding? Is
15 there a retroactive license, a penalty, in your mind?

16 A. I'm no expert, but it is a huge body of law. I
17 know that it's done to encourage the pre-licensing of
18 the photographs, which is unfortunately all too rare.

19 Q. Do you believe that pre-licensing of a
20 photograph is rare?

21 A. I believe that copyright infringement is a
22 problem.

23 Q. As opposed to retroactive licenses, how often
24 are your images pre-licensed?

25 MS. ZAHARIA: Objection. Vague.

1 BY MS. GATES:

2 Q. You can answer if you know.

3 A. I would have to look at the exact numbers.

4 Q. Could you provide your best estimate?

5 A. Again, I -- it's -- so I would have to research
6 the exact numbers, but there is a lot of copyright
7 infringement.

8 Q. Have you ever used a licensing agent?

9 MS. ZAHARIA: Objection. Vague.

10 BY MS. GATES:

11 Q. You can answer if you know.

12 A. I don't believe I have.

13 Q. Have you ever worked with a stock photography
14 agency?

15 A. No, maybe Tiny -- briefly, but I don't believe
16 I have. I'm not -- no, I don't believe.

17 Q. What is "Tiny"?

18 A. I believe -- oh, I don't believe I ever did,
19 but I know -- I don't believe I ever have.

20 Q. Why haven't you worked with a stock photo
21 agency?

22 A. The caliber of my work is far above what you
23 would find on a stock photography website.

24 Q. Is that the only reason you haven't worked with
25 a stock photography agency?

1 A. That's one reason. I don't want to degrade the
2 value of my pictures.

3 Q. How often do you shoot in national parks?

4 A. A lot. I was just in Yellowstone -- this year
5 I've been in Yellowstone, I've been in Arches, I've been
6 in Bryce Canyon, I've been in the Grand Canyon. I've
7 been in Yosemite all this year.

8 Q. Would you say that a majority of your
9 photographs are shot in national parks?

10 A. Yes, now they are, perhaps for the past two
11 years.

12 Q. Is there a -- can you give a reason why you've
13 focused more on national parks in the past two years?

14 A. Well, the national parks are a vast treasure,
15 and they have unfathomable beauty we are blessed in this
16 part of the world.

17 Q. How do you choose which park to photograph?

18 A. Well, they are all so beautiful with such
19 different layouts, and -- I mean, just -- I mean, a
20 variety between here and Montana. It's just beautifully
21 infinite. I was also in Canyonlands National Park too.

22 Q. Do you obtain a permit to shoot in the parks?

23 A. No, I don't.

24 Q. So we saw several instances today where you
25 allowed free use of your images with credit; is that

1 right?

2 MS. ZAHARIA: Objection. Vague.

3 THE WITNESS: Credit in addition to many other
4 things.

5 BY MS. GATES:

6 Q. What do you mean by "many other things"?

7 A. Well, we saw compensation. We saw a
8 celebration of my fine art. We saw complimentary
9 language like "dazzling photographs." We saw original
10 phone calls. We saw the juxtaposition of my views on
11 using the golden ratio in fine art. So, yeah, we saw
12 numerous factors in addition to credits.

13 Q. How often do you permit the use of your
14 photographs without a license fee?

15 MS. ZAHARIA: Objection. Vague.

16 BY MS. GATES:

17 Q. You can answer.

18 A. All right. In this case with all the
19 documentation, one can add the numbers up and see. But
20 generally if you're going to make money with
21 photography, you need my consent.

22 Q. Generally, how often do you charge a -- a
23 license fee for uses of your photograph?

24 A. I -- I think in this case we can -- you can
25 calculate the percentages, comparing the documents.

1 Q. Separate from this case, how often do you
2 charge a license fee for using your photographs?

3 A. For commercial use, it -- that's such a -- it
4 sort of depends on the case and who approaches me and
5 who wants to use them. Again, I focus on a photography
6 in building a long-term fine art brand and achieving
7 excellent photography and making a name for myself, so
8 I'm not sure exactly how often. I'm not sure what --
9 what that -- how do you mean by "often" compared to...

10 Q. Just compared to when you don't charge a
11 license fee, can you provide a percentage of when you
12 require a license fee versus when you would not, for
13 example, in a month?

14 A. Well, in this specific case, that was a busy
15 month because of the beautiful Death Valley photographs,
16 but in a given month, it depends on who requests and
17 what they want to use for, and so some months it would
18 be nobody requests or I don't grant any permission. So
19 it totally depends on the case.

20 Q. Would you say in a typical month that you do
21 not require a license fee in less than 50 percent of
22 instances?

23 A. If you're gonna make money off my photographs
24 in any particular month, you're going to have to
25 compensate me somehow.

1 Q. And what do you mean by "compensate somehow"?

2 A. You can provide a high-quality original article
3 with a phone call. You can pay me money, you can allow
4 me to speak of the fine art nature of my work. You can
5 present my work, and it results in fine art brand such
6 as the Smithsonian. Many different ways I can be
7 compensated.

8 Q. So in a typical month, how often do you not
9 require any monetary licensing for use of your
10 photographs?

11 A. For a --

12 MS. ZAHARIA: Objection.

13 BY MS. GATES:

14 Q. I'm sorry. I couldn't hear that over the
15 objection.

16 A. I'm not sure what you mean by "typical month."

17 Q. In an average month?

18 A. I'm not sure what you mean by "an average
19 month." I mean Yellowstone and the Grand Canyon in the
20 winter. I mean, every month is so different, I'm not
21 sure I have an average month.

22 Q. Could you provide an example of a month?

23 A. To summarize, if you're going to make money off
24 of my images, I need some form of -- of compensation,
25 and I also need to give my consent.

1 Q. How much financial compensation do you need in
2 a month?

3 MS. ZAHARIA: Objection. Vague.

4 THE WITNESS: It so varies from month to month
5 and the different uses of my photography.

6 BY MS. GATES:

7 Q. Do you have a specific budget that you try to
8 meet each month?

9 A. Not entirely. I mean, I -- basically, I -- I
10 mean, it varies so much from month to month. Again,
11 it's -- I think I'm having difficulty getting across the
12 fact that the pursuit of art is difficult, and artists
13 still need to be compensated and paid, and artists don't
14 always think in a strict dollar-or-cent type of thought
15 process, but by no means does that mean that their work
16 is worth nothing.

17 Q. Do you think that allowing use of your images
18 without a monetary license fee facilitates in building
19 your brand?

20 A. In the case of an exalted publication like the
21 Smithsonian where they reach out, and they also
22 compliment the beauty of my fine art photography, and I
23 believe that that definitely helps bolster my brand.

24 Q. And what about in other cases aside from the
25 Smithsonian?

1 A. Yes, I was proud to be able to serve the
2 National Parks Conservation Association. It's something
3 that I believe in deeply, the vast treasure of our
4 national parks. It was funding in Yellowstone, which
5 Teddy Roosevelt dedicated the arched cornerstone, a part
6 of history. And when you see the beauty of these
7 places, you realize that it's all worth conserving.

8 Q. Did you charge the National Parks Conservation
9 Association a monetary license fee for use of your
10 photo?

11 A. Yes. They were kind enough to offer.

12 Q. And what about uses by other entities such as
13 AccuWeather? Do you have the same feeling?

14 A. That was a different situation, so the feeling
15 was probably different.

16 Q. How is it a different situation?

17 A. It's a different organization, a different
18 contact, a different e-mail, a different structure. It
19 was different.

20 Q. Do you think that allowing use of your images
21 without a monetary license fee increases the likelihood
22 that your images will be shared?

23 A. It's --

24 MS. ZAHARIA: Objection. Vague.

25 THE WITNESS: That's vague. It all depends.

1 BY MS. GATES:

2 Q. What does it depend on?

3 A. Well, first of all, it depends on how good the
4 get images are. If they aren't any good, nobody's going
5 to share them.

6 Q. And if someone does share them?

7 MS. ZAHARIA: Objection. Calls for
8 speculation.

9 THE WITNESS: What's the question? If somebody
10 shares them?

11 BY MS. GATES:

12 Q. Do you think that allowing use of your images
13 without a monetary license fee increases the likelihood
14 that your images will be shared, assuming that the
15 images are good?

16 MS. ZAHARIA: Objection. Calls for
17 speculation.

18 THE WITNESS: Yeah. It depends on the
19 situation. We've seen about 10 situations today, and
20 they got my consent, and they compensated me in various
21 manners.

22 BY MS. GATES:

23 Q. Are you a member of any photography
24 associations?

25 A. My membership might have lapsed. You get those

1 e-mails saying you need to pay. So, yes, I support
2 them -- the ASMP and the PPA -- so thanks for the
3 reminder. I've been on the road. My membership has
4 lapsed. I will rejoin. I have been members. I think
5 I've been a member of them both recently, but I support
6 them. I'll join again if I'm not.

7 Q. Can you just spell out the names of those
8 organizations for the record?

9 A. The PPA, Professional Photographers
10 Association; and the ASMP, American Society of Media
11 Photographers. I'm not sure of exactly when I was
12 membership, but I support them both, and I'd do it again
13 when I'm sitting in front of a computer with a credit
14 card.

15 Q. Why have you supported those two associations
16 in the past?

17 A. Oh, because they're fine bodies that look out
18 for the rights of photographers. They write Amicus
19 briefs now and then, I believe.

20 Q. Aside from paying a membership fee, have you
21 been an active member in those associations in any other
22 way?

23 A. I think I had insurance through the PPA for a
24 while, but I generally stick to the sidelines, but I'm a
25 huge fan.

1 Q. Do you know what the general purpose or general
2 creed of these associations are?

3 A. Yes. To --

4 MS. ZAHARIA: Objection. Calls for
5 speculation.

6 THE WITNESS: Yeah. I mean, I -- I never met
7 with anybody, but generally I get the sense they support
8 artists and photographer's rights.

9 BY MS. GATES:

10 Q. You had mentioned earlier that Instagram
11 compresses images; is that correct?

12 A. I'm not sure of the technical term, but, yeah,
13 they make images smaller.

14 Q. So if you -- if you were to license an image
15 for online use, would you provide a compressed image?

16 A. For online use, I don't think it matters
17 because everybody's looking at a screen that generally
18 is 2K or 4K at the most, so I don't think any -- there's
19 any distinction, really.

20 Q. What is a 2K or a 4K?

21 A. Well, maybe HD monitor. They make different
22 resolutions of monitors. Like, I believe mine right
23 here is an HD monitor, and then I believe they have
24 2K monitors, and I believe they have 4K monitors, which
25 are higher resolution.

1 Q. So if you're providing an image for online-only
2 use, does it not matter what the image size or the
3 resolution is?

4 A. It matters to a degree, but for the -- all
5 intents and purposes, I think the vast majority of media
6 is consumed on the iPhone these days, which is smaller
7 than 1080P or -- I'm not sure.

8 Q. So for images that you provide for online use,
9 what do you typically provide?

10 A. Well, it's -- it's what do they typically use.
11 I mean, they typically use something that's, like, an
12 Instagram image. I think most, the vast majority, of
13 online images that you see are Instagram resolution.

14 Q. Do you know what an Instagram resolution is?

15 A. Not off the top of my head. It's probably
16 better than HD, and they change it over time too. So
17 maybe -- maybe they provide 4K images now. I'm not
18 sure, but for all intents and purposes, they provide web
19 graphics.

20 Q. When you say "web graphic," what are you
21 referring to?

22 A. When you view a website on the web, it has
23 graphics, and generally those images are, like, sized
24 for the web.

25 Q. Do you know what resolution of images Instagram

1 typically uses?

2 A. I don't.

3 Q. When you license images for online use, do the
4 entities that you're licensing to ask for a specific
5 resolution?

6 A. I don't believe they do.

7 Q. What about for print use?

8 A. For print on the cover of "Nikon Magazine," I
9 mean, I think they requested the original high-res file,
10 but I'm not sure. I can't recall. It depends on the
11 camera too, because higher image out of different
12 cameras is a very different thing, so...

13 MS. GATES: Okay. I think I may be getting
14 close to finishing up. If we can, just take a
15 five-minute break.

16 THE WITNESS: Okay.

17 MS. GATES: Thank you.

18 (Recess)

19 MS. GATES: So I have no further questions at
20 this time, subject to anything your counsel may do.
21 I'll pass the witness.

22 MS. ZAHARIA: Nothing further from Plaintiff's
23 counsel.

24 MS. GATES: Great. I thank you so much for
25 your time today.

1 THE WITNESS: Thank you, everybody.

2 MS. GATES: Madam Court Reporter, do you need
3 anything from us?

4 THE REPORTER: I do need some spellings when
5 we're off the record. And I just want to check on copy
6 orders real quick before we go off the record.

7 MS. GATES: Of course.

8 THE REPORTER: So does anyone want to order
9 copies? I guess this is basically for Plaintiff's
10 counsel?

11 MS. ZAHARIA: Yes.

12 THE REPORTER: Okay. Thank you.

13 Okay. Let me -- there's quite a few spellings
14 or clarifications, so just bear with me mostly for the
15 plaintiff -- for the deponent.

16 (Discussion off the record)

17 MS. GATES: And just one question for counsel,
18 will you accept service for the transcript?

19 MS. ZAHARIA: Yes, we will.

20 MS. GATES: Okay. Thank you.

21 THE REPORTER: Okay. Thank you.

22

23 (Deposition concluded at 5:25 p.m.)

24

25

- 0 -

1 DECLARATION UNDER PENALTY OF PERJURY

2
3 I, ELLIOT MCGUCKEN, Ph.D., do hereby certify under
4 penalty of perjury that I have read the foregoing
5 transcript of my deposition taken on March 15, 2021;
6 that I have made such corrections as appear noted on the
7 Deposition Errata Page, attached hereto, signed by me;
8 that my testimony as contained herein, as corrected, is
9 true and correct.

10 I declare under penalties of perjury of the
11 State of California that the foregoing is true and
12 correct.

13 Dated this _____ day of
14 _____, 2021, at
15 _____,
16 California.

17
18
19 _____
20 ELLIOT MCGUCKEN, Ph.D.
21
22
23
24
25

March 15, 2021

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DEPOSITION ERRATA SHEET

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ELLIOT MCGUCKEN, Ph.D.

Dated _____

March 15, 2021

227

1 UNITED STATES DISTRICT COURT)
2 FOR THE CENTRAL DISTRICT OF CALIFORNIA)

3
4 I, SHEREE L. SPENCER, CSR No. 11073, Certified
5 Shorthand Reporter, certify:

6 That the foregoing proceedings were taken
7 before me at the time and place therein set forth, at
8 which time the witness was put under oath by me;

9 That the testimony of the witness, the
10 questions propounded, and all objections and statements
11 made at the time of the examination were recorded
12 stenographically by me and were thereafter transcribed;

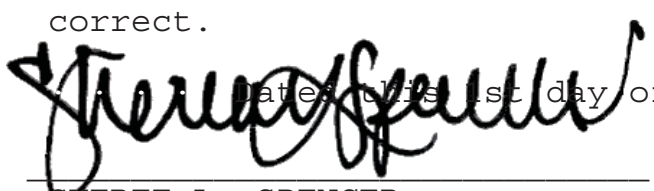
13 That a review of the transcript by the deponent
14 was requested;

15 That the foregoing is a true and correct
16 transcript of my shorthand notes so taken.

17 I further certify that I am not a relative or
18 employee of any attorney of the parties, nor financially
19 interested in the action.

20 I declare under penalty of perjury under the
21 laws of California that the foregoing is true and
22 correct.

23 I dated this 1st day of April, 2021.

24 
25 SHEREE L. SPENCER
CSR No. 11073

March 15, 2021

228

1 U.S. Legal Support, Inc.
11845 West Olympic Boulevard
2 Suite 600 West
Los Angeles, CA 90064
3

4 April 5, 2021

5 ELLIOT MCGUCKEN, Ph.D.
6 C/O STEPHEN DONIGER, ESQ.
DONIGER / BURROUGHS
7 231 Norman Avenue, Suite 413
Brooklyn, New York 11222
8

Re: Elliot McGucken v. Newsweek
9 Date of Deposition: March 15, 2021

10 Dear Dr. McGucken:

11 Please be advised that the original transcript of your
deposition in the above-titled matter is now available
12 for reading and signing. The transcript will be held in
our office for 30 days and made available for your
13 review.

14 Please contact us at
westclientsolutions@uslegalsupport.com
15 to arrange an appointment.

16 You may elect to waive signature of the original and
review a copy of the transcript. If it is more
17 convenient to review a copy, please notify our office
via certified or registered mail of any changes made to
18 your transcript. Please be advised that we are unable
to release the original transcript for review.

19 In the event you do not sign your deposition transcript
20 within the 30-day period, it may be used with the full
force and effect as though it had been read, corrected,
21 and signed.

22 Thank you,

23 U.S. LEGAL SUPPORT
Production Department
24

cc: All Counsel
25

March 15, 2021

1

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